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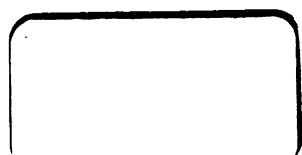
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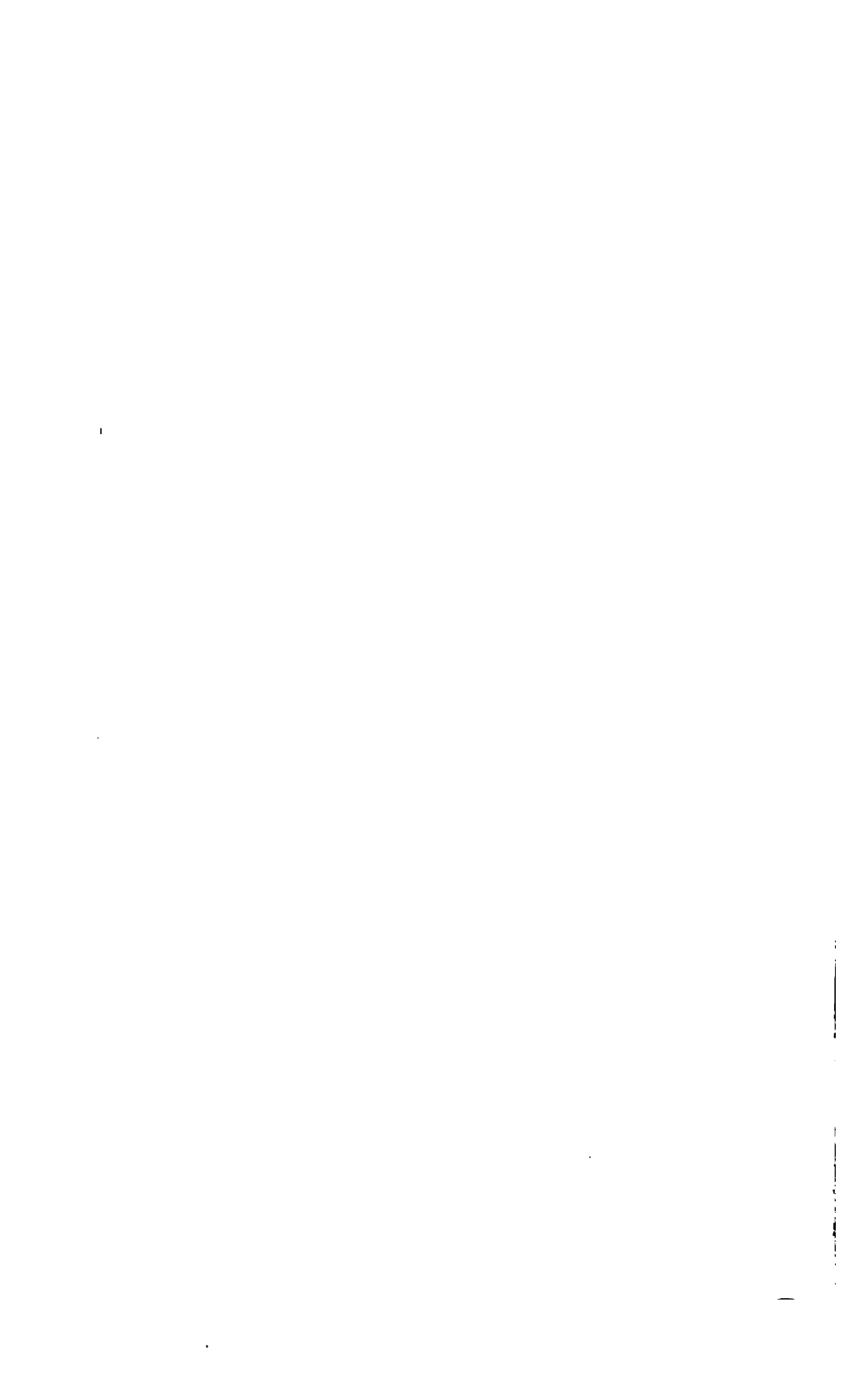
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E. J. Norton

A

TREATISE

ON THE

WRIT OF SCIRE FACIAS,

WITH AN

Appendix of References to Forms.

BY

THOMAS CAMPBELL FOSTER, ESQ.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

(Successors to the late J. & W. T. CLARKE, of Portugal Street.)

26, BELL YARD, LINCOLN'S INN.

MDCCCLI.

LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
LINCOLN'S INN.

TO

THE HON. SIR THOMAS NOON TALFOURD, KNT.,

ONE OF HER MAJESTY'S JUSTICES OF

THE COURT OF COMMON PLEAS,

ETC. ETC. ETC.

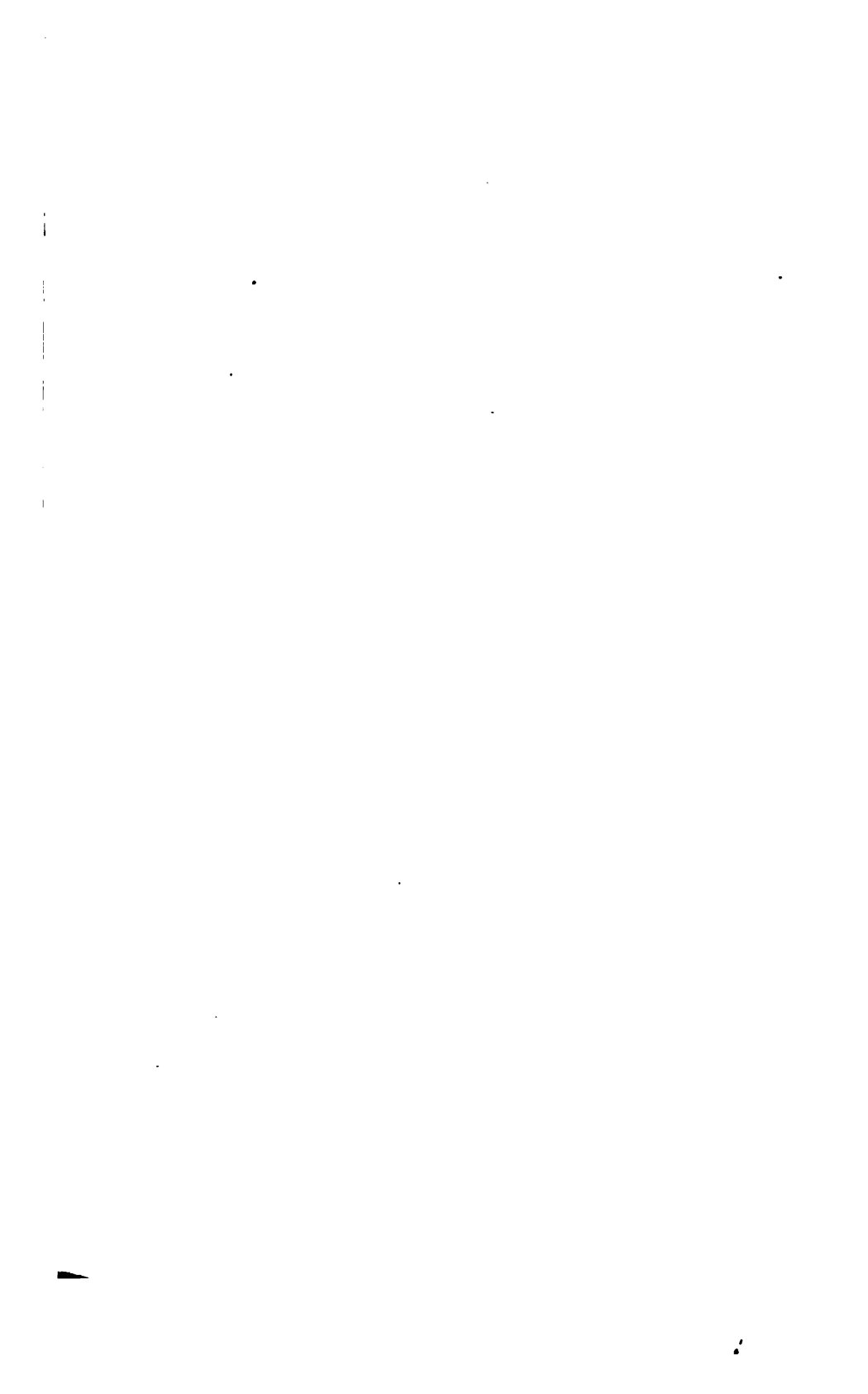
THIS VOLUME IS DEDICATED,

WITH

THE GREATEST RESPECT

**FOR THOSE AMIABLE QUALIFICATIONS, THOSE VARIED LEGAL AND
LITERARY ATTAINMENTS, AND FOR THAT GRACEFUL ELO-
QUENCE WHICH SO EMINENTLY DISTINGUISHED
HIM AS AN ADVOCATE, AND ULTIMATELY
RAISED HIM TO THE BENCH,**

By THE AUTHOR.



PREFACE.

IN presenting this treatise to the notice of the profession, the author ventures to hope that he has, in some measure, supplied a book of practice which was required.

It is indeed somewhat extraordinary, that, whilst there are many authors on almost every known branch of the law, until very recently, there was no treatise on the writ of *scire facias*. A very cursory glance at the present volume will show this writ to be required in a great variety of instances, the practice in each being distinct, and in many of them depending on different rules; the decisions which govern the practice being scattered through the books in an immense number of reports. Had the author believed that a treatise on this subject, recently published,* was adequate to the wants of the profession, although he had then progressed far through the labour of the present volume, and its preparation for the press had been announced, he would at once have ceased its compilation. But conceiving that an attempt to render that work (written originally with reference to the practice on the writ of *scire facias* in Ireland, founded in many instances on Irish statutes,) applicable to the practice in England, by bracketting within Irish statutes the different enactments made by English statutes, rather deteriorated from its utility as applicable to Ireland, than met the requirements of the profession in England, the author saw no reason to induce him to refrain from completing his task.

* Kelly on *Scire Facias*.

Hitherto, in this country, the English practitioner has been aided only by brief collections of the side notes of reported cases in the books of practice, with very slight attempts at methodical arrangement, and by the foot notes of cases in Williams' Saunders, which in the course of time have become so voluminous, and so devoid of arrangement, as to be almost useless without an expenditure of time which the practitioner can ill afford.

The author has endeavoured in the present volume to arrange the practice, as to the writ, under distinct and separate chapters, each treating only of one subject, so that a reference to any one chapter shall afford to the reader all the information on the subject treated of in it which he may require. In doing this, it seemed a natural arrangement to divide the instances in which the writ is necessary according to those principles which characterise it, and which regulate its issuing. Thus, in some cases, the writ is a continuation merely of a former suit; in others, it is an original action, or in the nature of one: and in those cases in which it is a continuation merely of a former suit, it is in some of them required to revive and have execution of a pre-existing judgment; in others, it is required to render liable to, or to enable a new party to the suit to have execution of, a pre-existing judgment.

The first book will be found to treat of those cases in which the writ is required to revive a pre-existing judgment; and of those exceptions in which it has been held that the writ is not necessary.

The second book treats of all those cases in which the writ is required because a new party becomes chargeable to, or benefited by, the judgment.

The third book relates to those cases in which the writ is an original action, or in the nature of one, and in which it is the first step taken to enforce a right, or pay-

ment of a debt due, as to repeal a patent, to have execution of a recognizance, &c.

The fourth book treats of pleading and practice points.

It was originally the author's intention to have furnished precedents of the writ in all cases, in an appendix. These, however, when prepared, appeared in the manuscript of so great a bulk, and would have so materially increased the size and price of the volume, that the author, yielding to the opinion of the publishers, determined to give references only to the precedents. These will be found in the appendix; and most of the precedents are to be found in the ordinary books of precedents.

To facilitate references, a table of the statutes and cases cited is prefixed, in addition to the usual index to the volume.

In many branches of the subject, the author has had no guide other than the decisions scattered at large over the books; in some, he has had little to do but to use materials already compiled, which he could not improve; but, in all instances, he has faithfully cited his authorities, not wishing in any case to claim a credit which did not belong to him.

In some of the cases treated of in which the writ is required, as where it is necessary to revive a judgment presumed to be satisfied by lapse of time, it is rumoured that the Common Law Commissioners intend altering the practice, by extending the time during which a judgment may be put in execution, from one to six years, and by providing a different form of reviving the judgment, which is to be termed a "writ of revivor," in the place of the present writ of *scire facias*. It is, however, impossible to predicate what changes may be contemplated; and, with the change proposed, most of the existing rules regarding the reviving of a judgment, expired by lapse of time, will probably be held to apply.

In placing this volume before the profession, the author feels conscious that it has many short-comings and many faults, which more leisure might have enabled him to avoid ; and he can only crave for it that indulgence and consideration which the first editions of most books of practice require. Should its reception warrant a future edition, it will be the author's earnest wish to make it deserving of the good opinion of the profession ; that he may, so far as he can, contribute something to the common store, in return for those treasures of legal lore which the sages of the law have freely, and without stint, offered to his use.

2, PLOWDEN BUILDINGS, TEMPLE,

January 16, 1851.

CONTENTS.

BOOK THE FIRST.

CHAPTER I.

INTRODUCTION.—ON THE NATURE AND APPLICABILITY OF THE WRIT OF SCIRE FACIAS.

	PAGE
What it is	2
Must be founded on a Record	2
Why so called	2
Lay at Common Law in Real Actions	2
Was given by Statute of Westminster the Second in Personal Actions	2
The Reason why it lay at Common Law in Real and not in Per- sonal Actions	2
The Reason why it is required in Personal Actions after the Ex- piration of a Year	3
An Addition to the Common-law Remedy by Action on the Judg- ment	5
First General Rule—to revive a Judgment after a Year and a Day	6
Second General Rule—where a New Party to the Suit	6
In the Case of a Public Company	7
Exceptions to the First General Rule	8
On a Statute Merchant or Recognizance	9
Exception in Case of the Crown	10
The Year, how computed	11
When it is a Judicial Writ	11
When it is an Original Writ, or in the Nature of an Original	12
To repeal Letters Patent	12
In the Nature of an Action	13
In the Nature of an Original Action	13
To revive a Judgment on a Recognizance	13
Limitation of the Writ	14
Proceedings on Old Judgment	14
Instances of its Applicability	15

CHAPTER II.

TO REVIVE A JUDGMENT, AFTER A YEAR AND A DAY, BY OR AGAINST THE SAME PARTIES.

Against whom it lies	17
Must be brought where the Venue in the original Action was laid	18

	PAGE
And in the Court where the Judgment was given . . .	19
The Record of the Judgment must be in Court . . .	19
And, if removed, must issue out of the Court where the Record is . . .	20
Must pursue the Terms of the Judgment, and Variance is Error . . .	20
Distinction in this respect between a <i>Scire Facias</i> and an Action on the Judgment . . .	20
On a Joint and Several Judgment . . .	21
Execution may be several, though <i>Scire Facias</i> joint . . .	21
Reversal of Judgment . . .	22
<i>Capias</i> cannot issue on a <i>Scire Facias</i> in Meane Process . . .	22
In Ejectment . . .	23
Where <i>Elegit</i> issued . . .	24
A Writ of Execution issued after a Year without a <i>Scire Facias</i> not void, but voidable only . . .	24
When irregular . . .	25
What amounts to Waiver of Irregularity . . .	26
When Plaintiff may quash his own Writ . . .	26
New <i>Scire Facias</i> , when necessary . . .	27
Must recite previous <i>Scire Facias</i> . . .	27
When unnecessarily sued out . . .	27
Judgment cannot be impeached on Motion to revive an Old Judgment . . .	27
Plaintiff may be nonsuited . . .	28
Writ of Error on, lies to Exchequer Chamber . . .	28
In the Case of the Crown . . .	29
Omission to sue out Writ, when required, Ground of Error . . .	29
Limitation of the Writ . . .	29
Practice . . .	30

CHAPTER III.

TO RECOVER DEMANDS ARISING AFTER JUDGMENT IN DEBT ON BONDS.

Depend on the Stat. 8 & 9 Will. III. c. 11, s. 8 . . .	32
Judgment to remain as a further Security to answer future Breaches . . .	32
The Common-law Rule . . .	33
The Statute extends both to Bonds with Conditions thereunder and to Bonds with Covenants, and Agreements in some other Indenture or Deed . . .	34
To what Cases the Statute does not extend . . .	34
All Cases in which Computation only is necessary are not within the Statute . . .	35
But are relieved by the 4 Anne, c. 16, ss. 12, 13 . . .	35
Is confined to Actions of Debt for the Penalty . . .	37
The Bond only a Security to the Amount of the Penalty . . .	37
Cases to which the Statute applies and where a <i>Scire Facias</i> is necessary . . .	37
Proceedings on . . .	38
The Jury, though summoned only on the common <i>Venire</i> , must assess Damages on Breaches assigned . . .	39
The Damages bounded by the Amount of the Penalty of the Bond . . .	39
The Statute compulsory as to Proceedings in all Cases within it . . .	40
<i>Scire Facias</i> . on further Breach of Condition of Bond contained in another Instrument . . .	41

	PAGE
On further Breaches of Conditions and Agreements contained in same Instrument	42, <i>et seq.</i>
<i>Scire Facias</i> for further Breach in Non-payment of an Annuity	43
<i>Scire Facias</i> for further Breach in Non-payment of further Installments	44
As to Assignment, and Suggestion of Breaches	44
When must assign	45
When must suggest	45
Costs on <i>Scire Facias</i>	46

CHAPTER IV.

TO LEVY RESIDUE OF DEBT AFTER EVICTION FROM POSSESSION UNDER AN ELEGIT.

When necessary	47
Remedy for Debts at Common Law	47
Of the Writ of <i>Elegit</i>	48
Common-law Rule in Debt to the King	51
Why called an <i>Elegit</i>	51
Was formerly a full Satisfaction of the Debt	52
Though the Debt were unsatisfied by the Plaintiff's Eviction from the Lands	52
The Remedy given by Stat. 32 Hen. VIII. c. 5	53
If Part of the Lands taken in Execution remain in Plaintiff's Hands, the Statute does not apply	55
If no Lands are extended the <i>Elegit</i> is in the nature of a <i>Fi. Fa.</i>	55
Form of Writ	57

CHAPTER V.

SCIRE FACIAS AD REHABENDAM TERRAM.

When it lies	58
When not necessary	59
When necessary in case of an <i>Elegit</i> upon a Judgment, or Recognizance at Common Law	59
On Tender in Court of Residue of Debt	60
When Satisfaction of the Debt has arisen from accidental Profits	60
Does not lie upon a general Averment that the Debt has been levied	60
The Defendant may also have a <i>Scire Facias</i> to account	61
Necessary in all Cases on an Extent on a Statute Merchant, Statute Staple, or Recognizance in the Nature of a Statute Staple	61
It lies also for the Grantee of the Reversion of the Lands extended	62
Mode of accounting in Common-law Courts	62
Mode of accounting in Equity	62
Motion for Reference to Master to take an Account	62
Accounting since Stat. 1 & 2 Vict. c. 110	62
Interest allowed on Judgment	63

CHAPTER VI.

SCIRE FACIAS QUARE RESTITUTIONEM NON ON A JUDGMENT REVERSED.

When the Writ is required	64
-------------------------------------	----

	PAGE
In what Cases it is not necessary	64
The Reason why it is necessary to issue the Writ	65
The Writ also necessary when there has been a Change of Parties, and a Judgment has been reversed in Error	65
The Forms	65

CHAPTER VII.

EXCEPTIONS TO THE GENERAL RULES REQUIRING A WRIT OF
SCIRE FACIAS.

<i>Scire Facias</i> not necessary where Judgment has been suspended by the Agreement of the Parties, till a Year and a Day after the Time agreed	67
Even if the Agreement be by Parol	69
<i>Scire Facias</i> not necessary where the Defendant brings a Writ of Error to revive the Judgment until after the Year from the De- termination of the Writ of Error has expired	70
And if the Judgment have expired by Lapse of Time, the Writ of Error revives it	70
<i>Scire Facias</i> not necessary where the Defendant obtains a Stay of Execution by Injunction out of Chancery	70
<i>Scire Facias</i> not necessary to revive a Debt secured on a Statute Merchant, Statute Staple, or Recognizance in the nature of a Statute Staple	71
Nor in case of a New Party affected by such a Security	71
These Recognizances of a Private Kind	71
Nature of a Statute Merchant	72
Nature of a Statute Staple	78
Of a Recognizance in the Nature of a Statute Staple	81
Reason of the Exemption of Debtors under these Securities from <i>Scire Facias</i>	83
<i>Scire Facias</i> not necessary where a Writ of Execution has been taken out within the Year	84
No Objection to a <i>Scire Facias</i> that it has been unnecessarily sued out	87
This Exemption applies only to the Lapse of Time, and not to Cases where there is a New Party to the Record	87
<i>Scire Facias</i> not necessary to revive a Judgment on a Warrant of Attorney given by an Insolvent Debtor under 1 & 2 Vict. c. 110 s. 87	88
Exemption confined to Cases where it would otherwise be required by Lapse of Time	88
<i>Scire Facias</i> not necessary to revive a Rule of Court in the nature of a Judgment under 1 & 2 Vict. c. 110, s. 18, on account of Lapse of Time	89
<i>Scire Facias</i> not necessary since the Statutes 7 & 8 Vict. cc. 110 and 113, in order to have Execution against a Member of a Joint- stock or Banking Company incorporated under either of those Acts, on a Judgment obtained against such Company or its Public Officer	90
Experiment to render liable to Execution the Lands of a Partner in a Banking Company framed under 7 Geo. IV. c. 46, without a <i>Scire Facias</i>	92
<i>Scire Facias</i> not necessary for the Crown to revive its Debts be- cause of the Lapse of Time	94

	PAGE
<i>Scire Facias</i> not necessary for the Crown in the Case of the Death of its Debtor, to have Execution against his Heir, Executor, or Administrator	94
<i>Scire Facias</i> not necessary for the Crown on Debts of Record, where the Execution is a First Proceeding, without any previous Judicial Inquiry, on an Affidavit that the Debt is in danger of being lost	95
Nor is it necessary before extending the Debt of the King's Debtor, on an Affidavit of Danger	97

BOOK THE SECOND.

CHAPTER I.

OF THE WRIT OF SCIRE FACIAS TO REVIVE A JUDGMENT WHERE THERE IS A NEW PARTY TO THE SUIT.

The Rule where a new Party to the Suit	99
<i>Scire Facias</i> not necessary where Party not beneficially interested	100
Foundation of the Rule	100
Reason of the Rule	100
Formerly a Suggestion on the Roll thought sufficient	101
But this Decision now overruled	102
A Suggestion is applicable only to Collateral Facts	102
<i>Scire Facias</i> necessary before proceeding against a Member of a Public Company, after Judgment against the registered Officer	103
Even where the Company's Act enacts that it shall not be necessary	103
<i>Scire Facias</i> not necessary in case of Survivorship, Suggestion sufficient	104
So where a nominal Plaintiff or Defendant is added to the Record	104
Application of the Rule	105

CHAPTER II.

OF SCIRE FACIAS AGAINST MEMBERS OF JOINT-STOCK COMPANIES.

The Rule of Law that the Execution must follow the Judgment	108
Formerly the Mode of proceeding against Shareholders of Public Companies on a Judgment against the Company was by entering a Suggestion on the Record	109
Now held that a Suggestion is only applicable to Collateral Facts affecting the same Parties	113, 116
The Proceeding against a Shareholder on a Judgment against a Public Company, it is now held, must be by <i>Scire Facias</i>	113, 146
<i>Scire Facias</i> may issue at once against Members "for the Time being," of a Co-partnership, without Leave of the Court	115
Leave of the Court required before <i>Scire Facias</i> can be issued against former Members	115, 123

	PAGE
Execution may issue against a Public Officer who does not plead that he is not a Member of the Company without any previous <i>Scire Facias</i>	117
Compulsory, under 7 Geo. IV. c. 46, to proceed against Public Officer. Individual Members cannot be sued	118, 146
So in Actions by the Company to sue in his Name	119, 147
A Public Officer will be presumed to continue such until the Contrary be shown	119
A Public Officer cannot plead his own personal Bankruptcy in bar of an Action against the Company	119
Against what Class of Members a <i>Scire Facias</i> must first issue	120
When Members of Banking Companies primarily and secondarily liable to, and when exempt from the Partnership Debts 121, 127,	128
A <i>primâ facie</i> Case must be made out to satisfy the Court that a <i>bond fide</i> Attempt has been made to recover the Debt against the existing Shareholders, before a <i>Scire Facias</i> will be allowed to issue against those secondarily liable	124, 135
Not necessary that it should issue against all the Shareholders primarily liable	124, 129
Meaning of the words "for the Time being"	126
When Shareholders primarily and when secondarily liable	127
Enough, if every reasonable and proper Effort has been made to obtain Payment from those primarily liable	128
Concurrent Writs of <i>Scire Facias</i> may be issued at the same Time on the same Judgment against different Shareholders	130
The Existence of a Collateral Security which might be made available no Reason why a <i>Scire Facias</i> should not issue against Members secondarily liable	134
If a <i>Scire Facias</i> be permitted to go against those secondarily liable they are not concluded thereby, but may plead that all Steps have not been taken against those primarily liable	136
A Plaintiff who has issued Execution against Members of a Joint-stock Company must go on with it with reasonable Despatch	136
A Member once shown to be such will be presumed to continue one till he proves the Contrary	137
If the Application to the Court to issue a <i>Scire Facias</i> against Shareholders secondarily liable fail, an amended Application may be made.	137
Review of the Cases	137
Proceedings against those secondarily liable on Motion after Notice	138
Form of <i>Scire Facias</i> against Shareholder at the time of the Contract	138
When the Liability of former Co-partners ceases	137, 139
The <i>Scire Facias</i> must state accurately to which Class of Shareholders the Defendant belongs, and must not state him to belong to both	140
The <i>Scire Facias</i> must aver the Debt to be due from the Company	141
Decisions in other Cases not Banking Companies	142
If nominal Defendant collusively suffer Judgment by Default, Shareholders should apply to the Court	142
Defendants cannot plead to the <i>Scire Facias</i> any Defence available in the original Action	142, 145
Omission to obtain the leave of the Court to issue <i>Scire Facias</i> when required an Irregularity merely	144
Cases of Exception to this Rule	148

	PAGE
Where Judgment has been signed against a Public Officer on a Warrant of Attorney the Court will direct an Issue to try Matters that might have been pleaded	150
<i>Scire Facias</i> a Nullity, when	151
<i>Scire Facias</i> against Shareholder of Joint-stock Company not necessary, when	151
Execution cannot issue against Shareholder under 7 & 8 Vict. c. 110, on Motion, without Ten Days' Notice given	152
If Notice insufficient, Application may be renewed	152
Effect of Joint-stock Companies Winding-up Act	153
Summary	154
The same Rules apply, as to suing a Shareholder of a Company under the Companies Clauses Consolidation Act, 8 Vict. c. 16, as have been held to apply to the Banking Act, 7 Geo. IV. c. 46	361

CHAPTER III.

SCIRE FACIAS ON THE MARRIAGE OF FEME PLAINTIFF OR DEFENDANT.

Of the Husband's Rights to the Wife's Choses in Action	156
For the Recovery of Debts due to the Wife <i>before</i> Coverture	156
Of the Wife's continuing Interest therein in Case of the Husband's Death before Execution	157
<i>Scire Facias</i> for the Wife as Survivor on Judgment by Husband and Wife	157
For the Recovery of Debts accruing to the Wife <i>after</i> Coverture	157
<i>Scire Facias</i> for the Husband as Survivor	157
For the Recovery of Debts due <i>by</i> the Wife <i>before</i> Coverture	158
When Action commenced by or against the Wife <i>dum sola</i> , <i>Scire Facias</i> not necessary	159
Of the Writ of <i>Scire Facias</i> where a Judgment has been obtained by or against a <i>Feme Sole</i> before Coverture	160
Where Judgment obtained by the Wife	160
Where Judgment obtained against the Wife	160
Effect of <i>Scire Facias</i> by or against Husband and Wife on Judgment recovered by or against the Wife whilst sole	161
The Venue of the Marriage need not be alleged	162

CHAPTER IV.

SCIRE FACIAS IN CASES OF BANKRUPTCY OR INSOLVENCY.

Effect of 6 Geo. IV. c. 16	163
Effect of 1 & 2 Will. IV. c. 56	164
Provisions of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 141	164
<i>Scire Facias</i> by Assignees on an Interlocutory Judgment	166
Assignees cannot make themselves Parties to the Record, till after Judgment	166
<i>Scire Facias</i> to make Assignees Parties to the Record, where Judgment obtained by Bankrupt or in his Name	167
<i>Scire Facias</i> by Assignees, to recover Money in Sheriff's Hands, levied on Judgment Debt of Bankrupt	167
Bankrupt a Trustee for his Assignees	168
<i>Scire Facias</i> against Bankruptcy Commissioner, to enforce Performance of Order of Court of Review	168
Amendment of <i>Scire Facias</i>	168

	PAGE
Costs on <i>Scire Facias</i>	168
Practice on <i>Scire Facias</i>	169
Effect of Provisions of Acts relating to Insolvents. 1 & 2 Vict. c. 110	170
— 5 & 6 Vict. c. 116	171
— 7 & 8 Vict. c. 96	171
Practice as to <i>Scire Facias</i> in Cases of Bankruptcy and Insolvency, the same	172
<i>Scire Facias</i> in Case of a Bankrupt Joint-stock Company	172
No <i>Scire Facias</i> necessary against future Effects of Insolvent	172

CHAPTER V.

OF SCIRE FACIAS IN CASE OF THE DEATH OF ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS, AND ALSO IN THE CASE OF THE DEATH OF A SOLE PLAINTIFF OR DEFENDANT.

Of the Necessity of issuing a Writ of <i>Scire Facias</i> in case of the Death of a Plaintiff or Defendant in an Action, in order to have Execution of the Judgment	175
Of the Doctrine of Survivorship where there are several Plaintiffs or Defendants, and one dies	175
Arrangement of the Subject of the Chapter	176
Where one of several Plaintiffs or Defendants has died pending a Suit	176
<i>Scire Facias</i> on the Death of one of several Plaintiffs or Defendants not necessary in a personal Action	177
The Doctrine of Survivorship does not apply to Real Estate. <i>Scire Facias</i> therefore necessary in such Cases	178
<i>Scire Facias</i> against Survivor and Heir, and Terretenants of Lands	179
Where a sole Plaintiff or Defendant has died pending a Suit	179
The Stat. 17 Car. II. is not confined to Actions which would have survived to the Personal Representative	180
Nor does it apply to Cases of Nonsuit	180
Where the Death of the Plaintiff or Defendant happens before Verdict, and after the Assizes begin	181
Where the Death of the Plaintiff or Defendant happens after Verdict, and before Judgment	183
Entering Judgment <i>nunc pro tunc</i>	184
When the Death of the Plaintiff or Defendant happens before Interlocutory Judgment	186
When the Death of the Plaintiff or Defendant happens after Interlocutory and before Final Judgment	186
Form of the Writ	187
When two Writs of <i>Scire Facias</i> necessary	188
What the Executor may plead	189
Where a sole Plaintiff or Defendant has died after Final Judgment and before Execution	189
<i>Scire Facias</i> by Administrator <i>durante minore Ætate</i> of an Executor	191
No <i>Scire Facias</i> necessary where the Death of the Judgment Creditor happens after the Debtor is charged in Execution	192
Where the Defendant seeks to obtain his Discharge as an Insolvent, the Plaintiff having died	193
Writ of Execution issued in the Lifetime of the Judgment Creditor valid after his Death	193
Of <i>Scire Facias</i> against an Executor	193
Declaration by Executors and Administrators	194
What may be pleaded by them	194

	PAGE		PAGE
Vane's, Sir Henry, case, 1 Lev. 68	209	Weston v. Foster, 5 Dowl. 54	339
Van Sandan v. ———, 1 B. & A. 214	44	—— v. James, 1 Salk. 42	182, 188
Vassandon v. Nash, 2 Dowl. 767	316	Wharton v. Musgrave, Cro. Jac. 331	19
Vaughan v. Williams, Cro. Jac. 171	28, 325	—— v. Richardson, 2 Stra. 1075	357
—— v. Wilson, 6 Dowl. P. C. 210	185	Wheaton v. Smegg, Cro. Jac. 372	349
—— v. Floyd, 1 Sid. 406	11, 256, 349	Wheatley v. Lane, 1 Wms. Saund.	
Vavasor v. Baile, 1 Salk. 52	20, 375	219 c, n.	353
Vergen's bail, 2 Stra. 1217	312	Wheelwright v. Jutting, 7 Taunt.	
Verni v. ———, 1 Lev. 223	269	304	311
Vernon v. Thurley, 4 Dowl. 660	311, 312	Whittenbury v. Law, 6 Bing. N. C.	
Vesey v. Harris et Ux., Cro. Car. 328	64	345	7, 103, 112, 115
Vicars v. Okey, 2 Keb. 307	100	White v. Hart, 1 B. & P. 134	169
Villars v. Parry and another, 1 Ld.		—— v. Sealy, 1 Doug. 49	37
Raym. 182	21, 375	Whitehead v. Scott, 2 M. & N.	
Vogel and another, Executors, v.		137	376
Thompson, 1 Exch. 60	192	Whitmore v. Robertson, 8 M. & W. 463	231
Waldecott v. Goulding, 8 T. R. 127	41, 43	Whitwell v. Sheer, 8 Ad. & El.	
Walker v. Thelluson, 1 Dowl. N. S.		301	376
277	26, 27, 28, 221, 351	Whitling v. Des Anges, 3 C. B.	
——, Sir Wm. Case, 2 Leon. 1	77	910	352
Wallop v. Irvin, 1 Wils. 315	186	Wickett v. Creamer, 1 Salk. 264	302
Walmsley v. Howard, Cro. Eliz. 618	309	Wilde v. Clarkson, 6 T. R. 303	37, 39
Walters, <i>Ex parte</i> , 2 M. D. & De		Wilbraham v. Snow, 2 Wms.	
Gex, 635	172	Saund. 47a, n. 1	218
Walton v. Potter, 1 Sco. N. R. 90	241	Willeson v. Whittaker, 7 Taunt.	
Waghorne v. Langmead, 1 B. & P.		53	311
571	194	Wilkes v. Adcock, 8 T. R. 27	310
Ward v. Thomas, Executors, 2		Wills v. Sutherland, 4 Exch. 211	
Dowl. P. C. 87	197	119, 147, 364	
—— v. Brumfit, 2 M. & S. 238	314, 315	Wilkins v. Cauty, 1 Dowl. N. S.	
—— v. Bendall, 1 Ld. Raym. 342	319	855	185
—— v. Tremmon, 4 Nev. & M. 876	311	—— v. Wetherill, 3 B. & P.	
Warden v. Fermor, 2 Camp. 285 n.	34	220	161
Warter v. Perry and another, Cro.		Williams v. Brown, 2 Dowl. 749	
Eliz. 199	308	317, 356	
Waterhouse v. Woodstreet, Cro.		—— v. Chambers, 10 Q. B.	
Eliz. 592	203	340	172
Wathen v. Beaumont, 11 East. 272	357	—— v. Dowimans, 7 Q. B.	
Watkins v. Haydon, 2 Bla. Rep. 784	70	112	322, 323
Watson v. Maskell, 2 Dowl. 810	184	—— v. Mason, 1 East, 89, n.	
—— v. Quilter, 1 D. & L. 244	101, 116	318, 356	
Waugh v. Ashford, 3 Dowl. 128	309	—— v. Moore, 2 Keb. 175	325
—— v. Austen, 3 T. R. 437	165, 168	—— v. Vaughan, Cro. Jac. 97	308
Weatherhead and others v. Landles,		—— v. Welsh, 1 Bail. Ct. Rep. 69	30
5 Dowl. 189	355	Wilmore v. Clerk and another, 1	
Webb v. Harvey, 2 T. R. 757	356, 309	Ld. Raym. 157	308, 309
—— v. Hill, 1 M. & M. 255	376	Willoughby v. Swinton, 6 East,	
—— v. James, 8 M. & W. 655		550	41, 44
40, 44, 45, 46, 359		Wilson v. Farr, 4 B. & A. 538	
—— v. Spurrell, Barnes, 261	181, 182	300, 355	
——, P. O., v. Taylor, 1 D. & L.		—— v. Biden, 4 M. & P. 537	318
676	100, 103, 104, 116, 377	Wimal v. Cook, 2 Dowl. 173	318, 357
Weddall v. Jocar, 10 Mod. 267	313	Winch v. Keely, 1 T. R. 619	168
Welford v. Davidson, 4 Burr. 2127	324	Wingfield v. Barton, 2 Dowl. N. S.	
Well's case, 1 Webs. R. 554	243	355	103, 108, 146
Welsh v. Ireland, 6 East, 613	41	Wingate v. Stanton, 1 Vent. 38	325
Welware v. Clerk, 1 Ld. Raym. 156	313	Winter v. Kretchman, 2 T. R. 46	
Wentworth v. Stafford, 5 Mod.	375	13, 169	
West v. Sutton, 1 Salk. 2	353	—— v. Lightbound, 1 Str. 301	
Western v. Creswick, 3 Salk. 214	65	11, 71, 216	

	PAGE		PAGE
Winter v. Trimmer, 1 Bla. 895	37	Wordsworth v. Gibson, 1 Moo. & P. 501	31
Withers v. Harris, 7 Mod. 68	2, 3, 4,	Wormwell v. Hailstone, 6 Bing. 668	11
103, 176, 177, 178, 179, 216, 217, 366		Wortley v. Rayner, 1 Doug. 637	14
Woodman v. Chapman, 1 Camp. 189	158	Wright v. Fairfield, 2 B. & Ad. 727	14
Wood v. Marston, 7 M. & W. 865	120, 364	—— v. Maddock, 8 Q. B. 122	15, 179, 190, 34
—— v. Mitchell, 6 T. R. 247	309, 312	—— v. Horton, 1 Stark. N. P. 400	31
—— v. Moseley, 1 Dowl. 513	355, 357	—— v. Nutt, 1 T. R. 389	11, 19, 22, 18
—— v. Peyton, 2 D. & L. 441	39	—— v. Page, 2 W. Bla. 637	318, 33
Woodyer v. Gresham, Skin. 682	14, 161	—— v. Sharp, 2 Salk. 288	20
Woodward and another v. Meredith, 2 D. & L. 125	169, 365		
Woolley v. Cobbe, 1 Burr. 244	308	Young v. Woolaston, Hardr. 113	17

A TREATISE

ON THE

WRIT OF SCIRE FACIAS.

BOOK THE FIRST.

CHAPTER I.

INTRODUCTION.—ON THE NATURE AND APPLICABILITY OF THE WRIT OF SCIRE FACIAS.

What it is, p. 2.

Must be founded on a Record,
p. 2.

Why so called, p. 2.

*Lay at Common Law in Real
Actions*, p. 2.

*Was given by Statute of West-
minster the Second in Per-
sonal Actions*, p. 2.

*The Reason why it lay at Com-
mon Law in Real and not in
Personal Actions*, p. 2.

*The Reason why it is required
in Personal Actions after the
Expiration of a Year*, p. 3.

*An Addition to the Common-law
Remedy by Action on the Judg-
ment*, p. 5.

*First General Rule—to revive
a Judgment after a Year and
a Day*, p. 6.

*Second General Rule—where a
New Party to the Suit*, p. 6.

*In the Case of a Public Com-
pany*, p. 7.

*Exceptions to the First General
Rule*, p. 8.

*On a Statute Merchant or Re-
cognizance*, p. 9.

Exception in Case of the Crown,
p. 10.

The Year, how computed, p. 11.

When it is a Judicial Writ, p.
11.

*When it is an Original Writ, or
in the Nature of an Original*,
p. 12.

To repeal Letters Patent, p.
12.

In the Nature of an Action, p.
13.

*In the Nature of an Original
Action*, p. 13.

*To revive a Judgment on a Re-
cognizance*, p. 13.

Limitation of the Writ, p. 14.

Proceedings on Old Judgment,
p. 14.

Instances of its Applicability,
p. 15.

As introductory to the consideration of the nature and applicability of the writ of *scire facias* it is proposed, first, to examine *what it is*; and, secondly, to take a cursory view of those instances in which it is required.

The succeeding chapters will be devoted to a more close examination of its applicability to particular cases.

And first, as to what the writ of *scire facias* is.

What it is.
Must be
founded on
a record.

A *scire facias* is a writ necessarily founded on some matter of record (a), and must issue out of the court where that record is (b). In many cases, however, it is granted partly upon a record and partly upon such a suggestion, without which no proceeding could be had upon the record (c).

Why so
called.

It is called a *scire facias* from these essential words in the writ, "*quod scire facias præfat. T. (the defendant) quod sit coram, &c., ostensurus si quid pro se habeat aut dicere sciatur quare,*" &c., and is a warning given to the defendant (*scire facias*) to appear in court and plead in bar of the execution, or show any cause if he can by release or otherwise, why execution should not issue on the judgment or record against him (d).

Lay at
common
law in real
actions.

In real actions (e), and on a writ of annuity (f), the writ of *scire facias* lay at common law if the plaintiff did not take out execution within a year and a day.

Was given
by the stat.
West. 2, in
personal
actions.

In personal actions this writ was given by the Statute of Westminster the Second (g), before which act, if the plaintiff did not have execution within a year and a day, he was by the common law put to a new action upon his judgment (h).

The reason
why it lay
at common
law in real
and not in
personal
actions.

The reason why the writ lay at common law in real and not in personal actions, was because, "at common law in real actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because the judgment *being particular in the real action*, quoad *the lands* with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of

(a) Bac. Abr. tit. *Scire Facias*, A. "Regularly upon the statute (West. 2), a *scire facias* cannot be granted but upon a record;" 2 Inst. 470.

(b) Tidd's Prac. 8th ed. 1139; Bac. Abr. tit. *Scire Facias*, D; 2 V. Wms. Saund. 72 a, note to *Underhill v. Devereux*; Com. Dig. tit. *Patient*, F, 7; *R. v. Sir O. Butler*, 3 Lev. 223; Com. Dig. tit. *Pleader*, 3 L, 3; 2 V. Wms. Saund. 72 f, n.

(c) 2 Inst. 470—679.

(d) Co. Litt. 291. a.; 2 V. Wms. Saund. 6, n. 1; 2 Tidd's Prac. 8th ed. 1154.

(e) *Per* Holt, C. J., in *Withers v. Harris*, 7 Mod. 68; Com. Dig. tit. *Pleader*, 3 L, 1.

(f) *Per* Powell, J., 7 Mod. 69.

(g) 13 Edw. I. st. 1, c. 45.

(h) 2 Inst. 469; Com. Dig. tit. *Execution*, I, 4; Co. Litt. 290. b.; Com. Dig. tit. *Pleader*, 3 L, 1.

the same thing of which judgment was given; and therefore, if there was no execution appearing on the roll, a *scire facias* issued to show cause why execution should not be awarded.

"But if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable by law on the judgment, because *there was not a judgment for any particular thing* in the personal action with which the execution could be compared: therefore, after a reasonable time, which was a year and a day (i), it was presumed to be executed, and therefore the law allowed him no *scire facias* to show cause why there should not be execution. But, if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to show how that debt of which the judgment was an evidence was discharged" (j).

The reason why it is required in personal actions after the expiration of a year.

In the case of *Withers v. Harris* (k) the reason given is, "for that in a real action one could have no other advantage of his judgment; but, in a personal action, debt would lie on the judgment" (l). "And the reason of a *scire facias* in a real action at the common law was for that the party might have a release or other matter to plead; and it was thought hard, in such case, to suffer execution to be without any opportunity of pleading, because thereby the freehold is not only divested, but the party put to an action of a higher nature, which sometimes the nature of the case did not allow of" (m).

It was however, in personal actions, at an early period, found inconvenient, and often a means of oppression, that the plaintiff should on the one hand be compelled, after the lapse of a year and a day, to commence a new action upon his judgment;

(i) "A year and a day is the time limited by law to the plaintiff for many purposes for prosecuting his right;" *Withers v. Harris*, 7 Mod. 65.

(j) Bac. Abr. tit. Execution, H, 407, 408; 2 Tidd's Prac. 8th ed. 1152—1154; 2 V. Wms. Saund. 72 d, n.; 3 Bla. Com. 421; Lush's Pr. 500; 2 Inst. 470; *Sir William Walker's case*, 2 Leon. 77; 3 *ib.* 259; 4 *ib.* 44.

(k) 7 Mo. 65, 66; 2 V. Wms.

Saund. 6, n.

(l) "In all cases where a man's writ was determined by a judgment, though he had passed a year and a day before execution, yet he had some benefit of his judgment; and therefore, if it were in debt, he had his action upon the judgment, being matter of higher nature than his first cause of action; if the action were real he had a *scire facias*;" *Withers v. Harris*, 7 Mod. 66.

(m) *Withers v. Harris*, *ubi supra*.

whilst, on the other hand, the defendant might be subjected to the accumulated costs of a series of actions (n).

To remedy these evils, and to make the forms of proceeding more uniform in real and personal actions, the Statute of Westminster was passed (o), which "applies a proper remedy by giving the *scire facias* upon the judgment after a year and a day" (p); and in real actions the former tedious process of the common law upon this writ, as it then lay, was abridged (q).

In the case of *Withers v. Harris* (r), Lord Chief Justice Holt is reported to have said, relative to this statute giving the writ of *scire facias* in personal actions, "that he was not satisfied with Coke's inference from it, that no *scire facias* did lie upon a judgment in a personal action" (s); but Powell, J., in the

(n) "Actions of debt upon judgments in personal suits have been pretty much discountenanced in the Courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one;" 3 Bla. Com. p 160.

(o) The following is the section of the Stat. of West. 2 (13 Edw. I. st. 1, c. 45), which gives this writ in personal actions:—"Because that of such things as be recorded before the Chancellor and the justices of the King that have record, and be enrolled in their rolls, process of plea ought not to be made by summons, attachments, essoin, view of land, and other solemnities of the Court, as hath been used to be done of bargains and covenants made out of the Court; from henceforth it is to be observed that those things which are found enrolled, before them that have record, or contained in fines, whether they be contracts, covenants, obligations, services, or customs knowledged, or other things whatsoever enrolled, wherein the King's Court, without offence of the law and custom, may execute their authority, from henceforth they shall have such vigour, that hereafter it shall not

need to plead for them. But when the plaintiff cometh to the King's Court, if the recognizance or fine levied be fresh, that is to say, levied within the year, he shall forthwith have a writ of execution of the same recognizance made. And if the recognizance were made, or the fine levied, of a further time, passed, the sheriff shall be commanded that he give knowledge (*quod scire faciat*) to the party of whom it is complained, that he be afore the justices at a certain day, to show if he have anything to say why such matters enrolled or contained in the fine ought not to have execution. And if he do not come at the day, or peradventure do come and can say nothing why execution ought not to be done, the sheriff shall be commanded to cause the thing enrolled or contained in the fine to be executed. In like manner an ordinary shall be commanded in his case, observing nevertheless, as before is said of a mean which by recognizance or judgment is bound to acquit;" 2 Inst. 469.

(p) *Dighton v. Granvil*, 4 Mod. 248.

(q) 2 Inst. 470.

(r) 7 Mod. 67.

(s) 2 Inst. 469. "Some diversity

same case, is represented as answering, "As to Coke's opinion upon the Statute of Westminster the Second, that before the statute, the writ of *scire facias* did not lie in personal actions, the law had been so taken ever since." To which Lord Holt replied, that "he submitted to Coke's opinion, though he saw no reason for it."

The remedy thus wisely given, to have execution on old judgments in personal actions, was however in addition to, and not in substitution for, the former remedy by an original action; and the plaintiff may yet, if he choose, waive the benefit of the statute, giving the writ of *scire facias*, and resort to his original action of debt on the judgment to which he is entitled by the common law (t).

An addition to the common-law remedy by action on the judgment.

To prevent this right of resorting to an action of debt on a prior judgment being used oppressively by plaintiffs in accumulating costs by successive actions, the stat. 43 Geo. III. c. 46, s. 4, was passed, which enacts that, "In all actions upon any judgment recovered which shall be recovered in any Court in England or Ireland, the plaintiff or plaintiffs, in such action on the judgment, shall not recover or be entitled to any costs of suit, unless the Court in which such action on the judgment shall be brought, or some judge of the same Court, shall otherwise order (u).

of opinion hath been, whether there was a *scire facias* at the common law before this Act, and the doubt grew for want of distinguishing between personal actions and real actions; for true it is, that in personal actions, if the plaintiff after judgment given, or recognizance acknowledged, sued out no process of execution within the year, he could have no *scire facias*; but the plaintiff or conusee was driven to his original (which is to be intended upon the judgment or recognizance), as in actions of debt, writs of annuity, or other personal actions, wherein debt or damages were recovered, or upon recognizances.

"But in real actions, or upon a fine levied, though the demandant or conusee sued out no execution within

the year after the judgment given or fine levied, the demandant or conusee of the fine after the year might have had a *scire facias* for the land, &c., because he could not have any new original, either upon the judgment or fine, as he might in other cases. Now this Act giveth a *scire facias* in personal actions in lieu of a new original."

(t) "This statute is in the affirmative, and therefore it restraineth not the common law; but the party may waive the benefit of the *scire facias* given by this Act (13 Edw. I. st. 1, c. 45), and take his original action of debt by the common law;" 2 Inst. 472.

(u) See 2 Tidd's Prac. 8th ed. 1005. This act, however, only extends to "judgments recovered by

In the case of *Hiscocks v. Kemp* (v), Lord Denman explains the reason why a *scire facias* is required after the expiration of a year in personal actions very clearly. He is there reported to say, "At the common law, a presumption arose from a plaintiff's delay beyond a year, that his judgment either had been satisfied, or from some supervening cause ought not to be allowed to have its effect. After such delay, therefore, he was not allowed to issue execution as a matter of course, but was driven to bring a new action on the judgment. The *scire facias*, which had been in use at the common law for the purpose of executing judgment in real actions after a year and a day's delay, was therefore adopted by the statute as a less expensive and dilatory course for the plaintiff, and as equally affording protection to the defendant, if he had any reason to show why the execution should not issue."

First general rule.—
To revive a judgment after a year and a day.

The rule therefore now is, since the Statute of Westminster, in personal as well as in real actions, that execution cannot issue upon a judgment above a year old, without a revival by *scire facias* (w), and the writ is then a judicial writ to continue the former suit, and to have execution of the judgment (x).

Second general rule.—
To revive a judgment where a new party to the suit.

It is also a rule that whenever it is sought to fix a party on a judgment given against another, it must be done by *scire facias* (y); the rule being that where a new person, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to, the execution, there must be a *scire facias* to make him a party to the judgment or recognizance (z).

With regard to one class of cases however, namely, to public companies, it was formerly held that, where an Act of Parlia-

plaintiffs, and not to a judgment of nonsuit;" *Bennett v. Neale*, 14 East, 344. And a judge at nisi prius has no power to order costs in an action on a judgment; *Jones v. Lake*, 8 Car. & P. 395; and see *Fraser v. Moses*, 1 Dowl. N. S. 705; *Lush's Pr.* 778; *Hanmer v. White*, 12 M. & W. 519.

(v) 3 Ad. & E. 679; S. C., 5 N. & M. 113.

(w) *Anon.* Loft, 329.

(x) 2 V. Wms. Saund. 71 a; Co. Litt. 291. a.

(y) *Cross v. Law*, 6 M. & W. 223.

(z) *Pennoir v. Brace*, 1 Lord Raym. 245; 1 Salk. 320; 2 V. Wms. Saund. 6, n. 1; and see 2 Inst. 471. "One that is not party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit; and so likewise of the tenant or defend-

ment allowed a public company to be sued in the name of its "public officer for the time being" (a), or in the name of "any officer of any such company" (b), or "in the name of one of two officers for the time being to be appointed by such company" (c), or in its corporate name (d), and expressly rendered the members of such company liable to execution on the judgment obtained, in an action against such public officer, officer, or company, this rule of law, "that where a new person, who was not a party to the judgment, derived a benefit by, or became chargeable to, the execution, there must be a *scire facias* to make him a party to the judgment," did not apply; and it was at one time held to be sufficient, previously to issuing execution against a member of a public company, to suggest on the record by leave of the Court, the facts which rendered him liable, without making him a party to the record by *scire facias* (e).

But under more recent decisions, actions against the public officers of joint-stock companies, (established prior to the 7 & 8 Vict. cc. 110 and 113,) wherein it is sought to have execution on the judgment against the members of such companies, form no exception to this general rule. In *Cross and others v. Law* (f), it was decided in the Court of Exchequer, and also in *Whittenbury v. Law* (g), in the Court of Common Pleas, and in *Bosanquet and others v. Ranford* (h), in the Court of Queen's Bench, and subsequently affirmed on error in the Exchequer Chamber (i), that the proper course of proceeding, where judgment has been obtained against the public officer of a joint-stock banking company, in order to have execution on the judgment against any member of the company, is by *scire facias* and not by entering a suggestion on the roll, overruling the decision of *Bartlett and another v. Pentland* (j). In the

In the case of a public company.

ant's part, for the alteration of person alterth the process; otherwise it is in cases of a statute staple or merchant, &c., because the process is given by other Acts of Parliament."

(a) Joint-stock Banking Act, 7 Geo. IV. c. 46, s. 9.

(b) Joint-stock Companies Act, 4 & 5 Will. IV. c. 94, s. 3, now repealed by 1 Vict. c. 73.

(c) 1 Vict. c. 73, s. 3.

(d) 7 & 8 Vict. c. 110, s. 25.

(e) *Bartlett v. Pentland*, 1 B. & Ad. 704; 6 Bing. N. C. 345.

(f) 6 M. & W. 223.

(g) 6 Bing. N. C. 345.

(h) 11 Ad. & E. 520.

(i) *Ranford v. Bosanquet and others*, 12 Ad. & E. 813; and 2 Q. B. 972.

(j) 1 B. & Ad. 704. "The uniform course, if new parties are in-

case of joint-stock companies and joint-stock banking companies, however, established since the stats. 7 & 8 Vict. cc. 110 and 113, those statutes lay down a different rule, and render the issuing of a *scire facias* in such cases unnecessary (*k*).

Exceptions
to the first
general rule.

There are, however, many exceptions to the first general rule that execution cannot issue upon a judgment above a year old, without a revival of the judgment by *scire facias*; as where the execution has been suspended by the agreement of the parties (*l*), even by parol (*m*); or the plaintiff has judgment with a *cesset executio* for a year; because the delay is by consent of parties and in favour of the defendant, and the indulgence of the plaintiff ought not to be turned to his prejudice (*n*). Also where the defendant brings a writ of error, and thereby hinders the plaintiff from taking out execution within the year, because the writ of error after service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued (*o*), is a *supersedeas* to the execution, and the defendant in error must wait till it be determined (*p*). While the cause is depending on the writ of error, it is still *sub judice* whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the final judgment given (*q*). So, where the plaintiff has been prevented from suing out execution within the year, by the defendant's obtaining an injunction out of Chancery, because "the rule of reviving a judgment above a year old by a *scire facias* before suing out execution upon it,

introduced, is by *scire facias*; suggestion is applicable only to collateral facts affecting the same parties; as for example, change of name, allowance, or disallowance of costs under Acts of Parliament and similar matters;" *per* Lord Denman, C. J., in *Bosanquet v. Ramford*, 11 Ad. & E. 528.

(*k*) See 7 & 8 Vict. c. 110, s. 68, and c. 113, ss. 9 and 13; and *post*, book i. ch. vii. as to "Public Companies;" and book ii. ch. ii. "*Scire facias* against Members of Joint-stock Companies."

(*l*) *Hiscocks v. Kemp*, 3 Ad. & E. 679; *Morris v. Jones*, 2 B. & C.

242; *Heath v. Brindley*, 2 Ad. & E. 365; *Powis v. Powis*, 3 Ad. & E. 682, n.; Har. Dig. 6012; 6 Moore, 517; see *post*, book i. ch. vii. *et seq.*

(*m*) *Morgan v. Burgess*, 1 Dowl. N. S. 850.

(*n*) 2 V. Wms. Saund. 72 c, n.; 2 Tidd's Prac. 8th ed. 1155.

(*o*) R. G. H. T. 4 Will. IV. r. 1, s. 9.

(*p*) 2 V. Wms. Saund. 72 d, n.; 2 Inst. 471.

(*q*) Bac. Abr. tit. Execution, H, 409; *Ib.* tit. Scire Facias, C, 131; 4 Com. Dig. tit. Execution, I, 4.

which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by a defendant, who is so far from being surprised by the plaintiff's delay that he himself tries all manner of methods whereby he may delay the plaintiff" (r). In any of these cases, the year and a day does not begin to run till the time for which the execution has been stayed has elapsed, the writ of error is determined, or the injunction is dissolved.

It has also been held that the conusee of a statute merchant, or of a statute staple, or of a recognizance in the nature of a statute staple, may sue out execution *at any time* without a *scire facias*; or if the conusee die, his executor may sue out execution without a *scire facias*; or if the conusor be returned dead by the sheriff, execution may be taken out against his lands in the hands of his heir, without a *scire facias*. This advantage over the common-law rules, which attach to other securities, was given by the statutes which originated these securities, in order to secure a ready remedy for trading debts "to encourage strangers to trade with us" (s). On a statute merchant or recognizance.

Also, where a *feri facias*, or *elegit*, or *capias ad satisfaciendum* has been taken out within the year after judgment, and not executed, it is unnecessary to take out a *scire facias* to revive the judgment (t); because the plaintiff has taken steps to satisfy his judgment, at a time when no presumption of payment existed (u); and the writ so taken out runs until it is executed (v): the only inference, if any, from the writ's not being returned, being, that the sheriff has been unable to find the defendant, in order to make the arrest (v).

Also, in the case of the warrant of attorney required from an insolvent debtor, before his adjudication and discharge to con-

(r) *Michel v. Cue et Usor*, 2 Burr. 660; accord. *Hiscocks v. Kemp*, 3 Ad. & E. 682.

(s) Bac. Abr. tit. Execution, B; 2 V. Wms. Saund. 71 c; 2 Inst. 395, 471; see *post*, book i. ch. vii.

(t) 2 Inst. 471; Com. Dig. tit. Execution, I, 4; Bacon's Abr. tit. Scire Facias, C, 133.

(u) *Per Parke, B.*, in *Simpson v. Heath*, 5 M. & W. 635; S. C., 7 Dowl. 832.

(v) *Per Parke, B.*, in *Greenshiels v. Harris*, 9 M. & W. 777; and see *Thomas v. Harris*, 1 Dowl. N. S. 793; *Moss v. James*, 1 D. & L. 807. The limitation of twelve months to a writ of meane process "does not apply after judgment;" *per Parke, B.*, *Harmer v. Johnson*, 14 M. & W. 343; and see the last case as to the principle laid down in the text generally; and see *post*, book i. ch. vii.

fess judgment for the amount of the debts in his schedule, under the 1 & 2 Vict. c. 110, s. 87, such judgment has the force of a recognizance, and no *scire facias* is necessary to revive it on account of any lapse of time, but execution may at all times issue thereon against the future property of the insolvent, by order of the Insolvent Court (*w*). So also, in the case of a rule of Court, (on an award, or by an agreement, or for costs,) in the nature of a judgment, under the 1 & 2 Vict. c. 110, s. 18, a writ of execution may issue after the expiration of a year without a *scire facias* (*x*).

In the case
of the
crown.

And, lastly, it is not necessary for the Crown to sue out a writ of *scire facias* to revive a judgment, when more than a year has elapsed since the judgment was recovered (*y*); or to have execution on a recognizance, acknowledged more than a year and a day (*z*), for *nullum tempus occurrit regi* (*a*). Neither in case of the death of the debtor of the Crown is a *scire facias* necessary against his heir, executor, or administrator, the proceeding in that case being by writ of *diem clausit extremum* against his lands and chattels (*b*). Neither is a *scire facias* to have execution for a specialty debt due to the Crown, on a bond or recognizance (*c*); or on a debt of record, (on commission issued out of the Exchequer, and inquisition of a simple-contract debt taken, returned and recorded in the Exchequer (*d*),) in all cases necessary, though it is the usual practice to proceed by *scire facias*. If there is no doubt about the debt, and there is danger of its being lost, from the insolvency of the debtor; then upon an affidavit of these facts, and the fiat of the Chancellor, or one of the Barons of the Exchequer, the Crown by virtue of its prerogative may sue out an immediate extent in chief, without the intervention of a *scire facias*, to have immediate execution of the Queen's debt (*e*). For when once debts

(*w*) See *post*, book i. ch. vii.

(*x*) See *post*, book i. ch. vii.

(*y*) *Anon.* 2 Salk. 603; 2 Tidd, 8th ed. 1090; Gilbert's Exchequer, 166, 167; 1 Price, 395; West, 316.

(*z*) "Where an obligation is acknowledged in a court of record, such recognizance is the same as a judgment, the conusor is personally present; the Court is supposed to know him as such a defendant against

whom they give judgment;" Gilbert's Hist. View of the Exchequer, p. 121, and p. 97.

(*a*) 2 Tidd's Prac. 8th ed. 1140.

(*b*) 2 Tidd's Prac. *ib.* 1140.

(*c*) Gilbert's Hist. View of the Exchequer, p. 106.

(*d*) 2 Tidd's Prac. 1092; Gilbert's Exch. 113, 166; and see *post*, book iii. ch. vii.

(*e*) 2 Tidd's Prac. 8th ed. 1092.

due to the Crown are reduced to a certainty and are not *in fieri*, the proceeding must be by distress for their speedy levy, and for the soonest satisfaction of the Queen's debt (*f*). But if it be doubtful whether the bond or recognizance be forfeited (*g*), or if the debtor be solvent, then the Crown cannot proceed by extent; but must issue a *scire facies* to give the debtor an opportunity of answer, before execution can be had of the debt (*h*).

The year must be computed from the day of signing judgment to issuing the writ; and not by the number of terms (*i*): <sup>The year. how com-
puted.</sup> the year depending upon the stat. 18 Edw. I. s. 1, c. 45, the words of which are "*infra annum*," is to be reckoned by calendar months (*j*).

In all cases where the writ of *scire facias* is required, either <sup>Where it is
a judicial writ.</sup> to revive a previous judgment above a year old (*k*), or where a person has become interested in the suit, who was not a party to the judgment (*l*), it is a *judicial* writ to warn the defendant to plead any matter in bar of the execution (*m*); and in these cases it is only a *quasi continuation of the former suit*, brought merely to revive the former judgment (*n*), and is then properly called a writ of execution (*o*).

In one case a *scire facias* disclosing the facts upon which it was founded, and requiring an answer from the defendant, was said to be in the nature of a declaration (*p*). In another, that the declaration and writ are synonymous (*q*).

But there are many cases in which the issuing of this writ ^{Where it is}

(*f*) Gilb. Treatise of the Exch. 96; *Attorney-General v. Sewell*, 4 M. & W. 91.

(*g*) Gilb. Ex. 166.

(*h*) 2 Price, 288, 292; 2 Tidd's Prac. 1092, 8th ed.

(*i*) *Simpson v. Gray*, Barnes, 197; Bac. Abr. tit. Scire Facias, C, 132; Com. Dig. tit. Execution, I, 4; see *Hart v. Middleton*, 2 Car. & K. 10, per Pollock, C. B. "In legal matters, a month means a lunar month; but in commercial matters a month always means a calendar month."

(*j*) 2 Tidd's Prac. 8th ed. 1154; *Winter v. Lightbound*, 1 Stra. 301; 2 V. Wms. Saund. 72 d, n.

(*k*) *Ante*, p. 6.

(*l*) 2 V. Wms. Saund. 6, n. 1; 2 Inst. 471.

(*m*) Co. Litt. 291.a.

(*n*) 2 V. Wms. Saund. 71 b; *Cocks v. Brewer*, 11 M. & W. 56; S. C., 2 Dowl. N. S. 759; 1 V. Wms. Saund. 291 c, n. (*e*); Bac. Abr. tit. Scire Facias, A, 129; *Wright v. Nutt*, 1 T. R. 389, per Ashhurst, J.; 2 Tidd, 8th ed. 1145.

(*o*) In these cases "the writ of *scire facias* is a writ of execution, and is to have execution;" Litt. s. 505; 2 Tidd's Prac. 8th ed. 1140; *Phillips v. Brown*, 6 T. R. 284.

(*p*) 2 Tidd's Prac. 1140, 8th ed.; *Vaughan v. Floyd*, 1 Sid. 406; Gilb. Hist. View of the Exch. 126.

(*q*) *Blake v. Dodemeed*, 2 Str. 776.

an original,
or in the na-
ture of an
original.

To repeal
letters
patent.

is the commencement of *an original action* (*q*), and in which also it is in the nature of an original action (*r*).

It is an original action when the writ is issued to repeal letters patent, and in that case it is founded on the record of the patent (*s*), and may be sued out either in the Petty-bag Office in Chancery (*t*), or in the Court of Queen's Bench (*u*); and it lies "when the Queen, by her letters patent, doth grant by several letters patent, one and the self-same thing to several persons," for the first patentee to repeal the subsequent letters patent; or, when the Queen is deceived by a false suggestion, she may by her prerogative, by *scire facias*, repeal her own grant;" or, "when she hath granted anything which by law she cannot grant, in her own right and for the advancement of justice, she may have a *scire facias* to repeal her own letters patent" (*v*): or "where a patent is granted to the prejudice of the subject, the Queen, of right, is to permit him to use her name for the repeal of it, in a *scire facias*, at the Queen's suit, and to prevent multiplicity of actions; for such actions will lie notwithstanding such void patent" (*w*). It lies to repeal the grant of a franchise, where such grant is injurious to another; as the grant of a market (*x*): as also in the case of an abuse of a franchise by negligence, as of a ferry (*y*), for the Crown to repeal the grant, and vest it in some other person. It also lies to repeal a patent granting an office, where the officer neglects his duty; as where a serjeant-at-arms "absented himself from the exercise of his duties, so that the business of the King remained undone" (*z*); for where the holder of a patent office has committed a cause of forfeiture, the patentee shall not be ousted by the King, except by *scire facias* at the suit of the King: and the reason of this is, as it seems, "because he who is in, and placed in an office by matter of record, of which the King himself has notice, ought not to be removed except by

(*q*) 2 Tidd's Prac. 1139, 8th ed.;
Litt. Ten. s. 505.

(*r*) Co. Litt. 291. a.; *Burr v. At-wood*, 1 Salk. 89.

(*s*) "A patent is a record in Chancery upon which a *scire facias* may issue, and it is a sufficient record whereon to found it;" *R. v. Sir O. Butler*, 3 Lev. 223; Bac. Abr. tit. *Scire Facias*, C, 138.

(*t*) 2 Tidd's Prac. 1139, 8th ed.;
2 V. Wms. Saund. 72, n.

(*u*) 2 Chit. Arch. 8th ed. 1023;
see now 12 & 13 Vict. c. 109, s. 32;
and *post*, book iii. ch. ii.

(*v*) Bac. Abr. tit. *Scire Facias*,
C, 3.

(*w*) *Ibid.*; *Brewster v. Weld*, 6
Mod. 230.

(*x*) *Brewster v. Weld*, 6 Mod.
230; *Rex v. Eyre*, 1 Stra. 43; S. C.
10 Mod. 258.

(*y*) *Peter v. Kendal*, 6 B. & C. 710.

(*z*) *Rex v. Eston*, Dyer, 198 a.

matter of record, *scilicet* by *scire facias*, and avoidance of the letters patent thereof" (a). In all these cases it is an original writ.

And it is in the *nature of an original action*; because, to authorize the plaintiff's attorney to sue out the writ, he must have a new warrant and retainer, which is not so of a mere writ of execution (b). Nor is it necessary to have a judge's order to change the attorney before suing out this writ by a different attorney to the one who conducted the action to judgment (c). A new right also accrues to the plaintiff by the judgment of revivor, in bar of the Statutes of Limitation; the time of limitation beginning to run from the date of the revived judgment (d).

Is in the nature of an original action.

The writ in all cases is *in the nature of an action*, because the defendant may plead to it; for, whenever the defendant may plead to any writ, whether original or judicial, it is in law an action (e); and, though to revive a judgment, it is a judicial writ to continue the effect of, and "have execution" (f) of, the former judgment; yet it is *in the nature of an action*, because the defendant may plead any matter *in bar of the execution* upon the first judgment (g). But in some cases—
as, to have execution on a recognizance, or debt acknowledged of record (h), and enrolled (i)—there has been no former suit, at least against the conusor, even in a recognizance of bail, and it is then *in the nature of an original action* (j),

Is in the nature of an action.

To revive a judgment on a recognizance.

(a) Dyer, 198 b.

(b) *Treviban v. Lawrence*, 2 Ld. Raym. 1048; *Herd v. Berstowe*, Cro. Eliz. 177.

(c) *Batchelor v. Ellis*, 7 T. R. 337.

(d) *Farran v. Beresford*, 10 Cl. & Fin. 319; *O'Brien v. Ram*, 3 Mod. 170, 186.

(e) 2 V. Wms. Saund. 6 a; Co. Litt. 291. a.

(f) Litt. Ten. s. 505.

(g) *O'Brien v. Ram*, 3 Mod. 189. "A release of execution is a good bar in a *scire facias*;" Co. Litt. 291. a. But "a release of actions is no bar to have execution;" *Altham's case*, 8 Co. Rep. 150. "And seeing the words of the *scire facias* be *quare executionem habere non debet*, the

tenant or defendant may plead anything in bar of execution;" 2 Inst. 472; and see Bac. Abr. tit. Sci. Fa. A and E. "It has been held in a variety of cases that a *scire facias* is an action;" *per* Buller, J., in *Winter v. Kretchman*, 2 T. R. 46. "A *scire facias* is in effect a *new action*, where the defendant may defend himself by pleading what has been done under the original judgment;" *Holmes v. Newlands*, 5 Q. B. 370.

(h) 2 V. Wms. Saund. 67 b.

(i) *Glyn and others v. Thorpe*, 1 B. & Al. 153; 2 V. Wms. Saund. 71 c, n.

(j) *Winter v. Kretchman*, 2 T. R. 46; *Rex v. Eyre*, 1 Stra. 43. "Upon a recognizance it is always an original proceeding;" 2 V. Wms. Saund.

and a plea of "a release of all actions is a good bar of the same" (k).

Limitation
of the writ.

By the 3 & 4 Will. IV. c. 27, s. 40, twenty years is the period to which the effect of a judgment is limited; and no *scire facias* can be sued out to revive a *judgment*, unless within twenty years next after a present right to receive the sum due on the judgment shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and no proceeding shall be brought in such case but within twenty years after the last payment or acknowledgment; and, by the Law Amendment Act, 3 & 4 Will. IV. c. 42, s. 3, a *scire facias* upon a recognizance, to which before that Act there was no limitation (beyond a legal presumption of the satisfaction of the debt after twenty years without acknowledgment) (l), is included in the limitations therein described; that is, twenty years is a statutable bar to it, in the same manner and with the same exceptions as to a *scire facias* on a judgment (m).

Proceedings
on old
judgment.

If the judgment is under seven years old, the *scire facias* issues of course upon a *præcipe* without rule or motion (n); if above seven and under ten years old, a side bar or treasury rule is obtained (o). By 1 R. G. H. T. 2 Will. IV. r. 79, "a *scire facias* to revive a judgment more than ten years old shall not be allowed without a motion for that purpose in term, or a judge's order in vacation; nor, if more than fifteen, without a rule to show cause." The judge will grant an order without a summons, where the judgment is more than ten and under fifteen years old. After fifteen years a judge at chambers will not interfere (p). The general rule with respect to these cases is, that an affidavit stating that the debt is still outstanding, and that the judgment remains unsatisfied, should be made by

71 b, n.; *Woodyer v. Gresham*, Skin. 682; *Fenner v. Evans*, 1 T. R. 267.

(k) Co. Litt. 291. a. 298. a.; *Altham's case*, 8 Co. Rep. 150; 1 Rol. 900; 5 Com. Dig. tit. Pleader, 3 L. 3.

(l) 1 Tidd's Prac. p. 15, 17, 8th ed.; *Curtis v. Fitzpatrick*, Peak. Ad. Ca. 92; *Flower v. Bolingbroke*, 1 Stra. 639.

(m) 2 Chit. Arch. 8th ed. 1010.

(n) 2 Chit. Pract. 1026.

(o) Jervis's New Rules, 4th ed. p. 82, n. (a); 2 V. Wms. Saund. 72f, n.; *Hardisty v. Barny*, 2 Salk. 598; 2 Chit. Arch. 8th ed. 1010 1026.

(p) 2 Chit. Arch. 8th ed. 1026.

the party in whose favour the judgment was given, or by the attorney who acted for him as such when the judgment was obtained (*g*).

Having now, in rapid review, shown the nature of the writ of *scire facias* in its different characters, namely, as a *continuation* of a former suit (*r*), and in the nature of an *action* (*s*); as an *original action* (*t*), and as in the nature of an *original action* (*u*)—it is proposed briefly to draw attention to its varied applicability, in order, within the scope of an introduction to the subject, to convey a superficial view of those cases in which the writ is required, and in which it is the proper remedy. Afterwards, its particular applicability in each case will form the subject of distinct chapters and closer examination.

The subjects to which the writ of *scire facias* is applicable may be divided into two leading classes, each marked by distinctive principles: namely, first, where it is required to *continue a former suit to execution*; and secondly, where it is the *commencement and foundation* of an action, or is *in the nature of an original action*. Instances of its applicability.

Each of these leading divisions or classes of cases to which this writ is applicable and in which it is necessary may be again subdivided; the first into those cases where, first, it is sought to revive a judgment in order to have execution in a suit by or against the *same party*; and secondly, where it is sought to revive a judgment by or against a *new party* to the suit, as in the case of members of joint-stock companies, assignees of bankrupts, or insolvents, executors, or administrators, or heirs, or in cases of bail; or where a *feme sole* has married since the judgment: and the second division, or class of cases, may be sub-divided into those cases where, first, the *scire facias* is *in the nature of an original action*, as to have execution on a recognizance or on a bond to the Crown; and secondly, where it is an original action, as to reverse a grant by letters patent, on the ground of deceit, or prior grant of the Crown of the same thing to another party.

Hitherto there have been but slight attempts to classify the cases in which this writ is necessary according to the principles on which it appears to be founded; and it is hoped, that

(*g*) *Duke of Norfolk v. Spencer*, 4 Dowl. 746; and see *Smith v. Mee*, 1 D. & L. 907; *Wright v. Maddocks*, 8 Q. B. 119.

(*r*) *Ante*, p. 6, 11.
(*s*) *Ante*, p. 11, 13.
(*t*) *Ante*, p. 12.
(*u*) *Ante*, p. 13.

the attempt now to do so will be found advantageous as avoiding confusion and leading to clearness of apprehension.

The accompanying table and heads of chapters (v) will also be found of use to the reader, for reference, in the course of the examination of this subject in its different divisions.

We will now first proceed to treat more particularly of the cases in which the writ of *scire facias* is required to continue a former suit to execution, as subdivided into the two classes just stated; viz. first, where the writ is required to revive a judgment by or against the same party; and secondly, where it is required to revive a judgment where there is a new party to the suit.

(v) See table of classification and heads of chapters at commencement of book, *ante*.

CHAPTER II.

TO REVIVE A JUDGMENT, AFTER A YEAR AND A DAY,
BY OR AGAINST THE SAME PARTIES.*Against whom it lies*, p. 17.*Must be brought where the Venue in the original Action was laid*, p. 18.*And in the Court where the Judgment was given*, p. 19.*The Record of the Judgment must be in Court*, p. 19.*And, if removed, must issue out of the Court where the Record is*, p. 20.*Must pursue the Terms of the Judgment, and Variance is Error*, p. 20.*Distinction in this respect between a Scire Facias and an Action on the Judgment*, p. 20.*On a Joint and Several Judgment*, p. 21.*Execution may be several, though Scire Facias joint*, p. 21.*Reversal of Judgment*, p. 22.*Capias cannot issue on a Scire Facias in Mesne Process*, p. 22.*In Ejectment*, p. 23.*Where Elegit issued*, p. 24.*A Writ of Execution issued after a Year without a Scire Facias not void, but voidable only*, p. 24.*When irregular*, p. 25.*What amounts to Waiver of Irregularity*, p. 26.*When Plaintiff may quash his own Writ*, p. 26.*New Scire Facias, when necessary*, p. 27.*Must recite previous Scire Facias*, p. 27.*When unnecessarily sued out*, p. 27.*Judgment cannot be impeached on Motion to revive an old Judgment*, p. 27.*Plaintiff may be nonsuited*, p. 28.*Writ of Error on, lies to Exchequer Chamber*, p. 28.*In the Case of the Crown*, p. 29.*Omission to sue out Writ, when required, Ground of Error*, p. 29.*Limitation of the Writ*, p. 29.*Practice*, p. 30.

A *scire facias* to revive a judgment is either by or against the same or different parties (a). It is against different parties in cases of death, marriage, or bankruptcy, to revive the judgment by or against the representatives of the original parties to the

Against
whom it
lies.

(a) 2 V. Wms. Saund. 72 d, n. ; Tidd, Prac. 9th ed. 1122 ; 8th ed. 1152.

suit (b). In the present chapter it is intended to confine attention to those cases only in which it is necessary to revive a judgment by or against the same parties.

After the year and a day, a *scire facias* lies between the same parties who were parties to the judgment (c).

We have already seen why it is required in personal actions to revive a judgment after a year and a day by *scire facias* (d). When thus issued to revive a judgment already obtained, which by lapse of time the law presumes to be executed, or to have been released, an opportunity is afforded to the defendant of pleading that the judgment is executed, or of showing a release or discharge of the debt, if he can, before the plaintiff shall have execution. It is in this case manifestly not an original proceeding, but the continuation of a former suit (e).

Must be
brought
where the
venue is
laid.

The *scire facias* must be brought in the same county where the venue was laid (e). In a recent case, where the venue in the original action was laid in London, and in the declaration on *scire facias* to revive the judgment the venue was laid in Kent, it was objected on the authority of the case of *Musgrave v. Wharton* (f) that this was a material variance, the modern practice of setting out the *recuperavit* of the judgment only in general terms, not abolishing the requisites of the ancient mode of setting out the whole record; and that formerly such a variance in setting out the record would have been fatal. It was decided upon the pleadings, that the judgment alone and not the venue was in issue, and that the plea of *null tiel record* raised no other question (g). The case, however, does not appear to have been carried further, and it may be a question how far the *identity of the judgment* is sufficiently established with such a variance on the record; and, as the *scire*

(b) There must be privity, or a *scire facias* will not lie; Com. Dig. tit. Pleader, 3 L, 7.

(c) Com. Dig. tit. Pleader, 3 L, 5.

(d) *Ante*, ch. i. p. 3; *Hiscocks v. Kemp*, 3 Ad. & E. 679; 2 Tidd's Prac. 8th ed. 1152; 2 V. Wms. Saund. 72 d, n. 3; Com. Dig. tit. Pleader, 3 L, 4.

(e) 2 Tidd's Prac. 8th ed. 1175; 9th ed. 1103.

(f) *Musgrave v. Wharton*, Hob.

6; S. C., Cro. Jac. 331. "The *scire facias* ought *always* to pursue the first action;" Bac. Abr. tit. Scire Facias, D, 148; and see 2 V. Wms. Saund. 72 x, n. Accordingly "a *scire facias* must be in the same county where judgment or where execution is awarded;" Com. Dig. tit. Execution, I, 4.

(g) *Phillips v. Smith*, 2 Dowl. N. S., 688; 2 Tidd's Prac. 8th ed. 1158.

facias in this case is but the continuation of the former suit, such a variance would seem to be an irregularity, which cannot be amended upon the trial of an issue of *nul tiel record* (*h*). An action of debt on the judgment, the alternative remedy, must be laid in the county where the instrument is recorded, or where it first becomes operative (*i*). And, as in an original action, the venue cannot be changed arbitrarily, after plea, by the plaintiff from that originally laid, without a proper application on special grounds to amend the declaration by changing the venue (which application may be refused, as it is the plaintiff's fault that the venue was not rightly laid in the first instance (*k*)), it would seem that the same rules would apply to a declaration on a *scire facias*; and, being a continuation of the original action, this would make the record inconsistent with itself (*l*). The case of *Phillips v. Smith* (*m*) seems to decide only that the plea of *nul tiel record* is not the proper mode of taking advantage of the alteration of venue.

The *scire facias* must issue out of the Court in which the original action was depending (*n*); and where the judgment was given, if the record remains there (*o*). The record of the judgment must be in Court, for it is the foundation and warrant for the *scire facias* (*p*). The *scire facias* must recite the judgment that was given (*q*); and before what judge (*r*). According to the old practice the whole record was set out in the declaration in *scire facias*; but, by the modern practice, it is usual only to set out the *recuperavit* in general terms (*s*). If the record of the

And in the Court where the judgment was given. The record of the judgment must be in Court.

(*A*) 2 Tidd's Prac. 9th ed. 1122; 8th ed. 1175; *Wharton v. Musgrave*, Cro. Jac. 331; *S. C.*, Hob. 4; *Yelv.* 218; *Wright v. Mett*, 1 T. R. 388; and see *Eyres v. Tainton*, Cro. Car. 313. And see *Cooper v. Pennefather*, 7 C. B. 739.

(*i*) *Lush*, 342; *Gilb. Debt.* 413; *Hartley v. Hodgson*, 8 Taunt. 171; Cro. Car. 313.

(*k*) *Ayres v. Burton*, 6 Taunt. 408; *Lush*, 347; *Lewis v. Shelly*, 7 Taunt. 146.

(*l*) See observations of Abinger, C. B., in *Harwood v. Law*, 7 M. & W. 207; and see Com. Dig. tit. Execution, I, 4; *Barnes*, 207.

(*m*) 2 Dowl. N. S. 688.

(*n*) 2 V. Wms. Saund. 72 *a*.

(*o*) 2 V. Wms. Saund. 72 *f*, *n*.

"If it is to have execution of a judgment, the judgment must be entered upon record before the *scire facias* sued; and it is not sufficient that it is signed by the officer;" Com. Dig. tit. Pleader, 3 L, 3; and see Com. Dig. tit. Bail, R, 2; 2 Tidd's Prac. 8th ed. 1156; 9th ed. 1105.

(*p*) Com. Dig. Pleader, 3 L, 3.

(*q*) Cro. Eliz. 817; Com. Dig. Pleader, 3 L, 3.

(*r*) Com. Dig. Pleader, 3 L, 3.

(*s*) *Phillips v. Smith*, 2 Dowl., N. S., 688; *Fowler v. Rickerby*, 9 Dowl. 682.

And if removed, must issue out of the Court where the record is.

judgment be removed, the *scire facias* must issue out of the Court where the record is (*t*), and must show how it came to be removed, whether by *certiorari* or writ of error; as, in the first case, the writ must set forth the limits of the inferior jurisdiction, and pray execution within those particular limits; in the latter case, the writ must pray execution generally; for by the affirmance of the judgment it becomes the judgment of the superior Court, and the party may have execution in any part of England (*u*).

Must pursue the terms of the judgment, and variance is error.

The *scire facias* must pursue the terms of the judgment, and a variance from it is error, as if it mistakes the sum (*v*). Though an immaterial variance from the record does not prejudice, as an omission in the style of the king (*w*). It need not recite all the proceedings upon which the judgment was given, but the judgment only (*x*). The power of amendment has, however, now greatly lessened the importance of these rules (*y*). Where a judgment was obtained against two, and a *scire facias* was issued to revive the judgment against one only, the *scire facias* was held to be demurrable; the judgment being joint, so ought the *scire facias* (*z*). But the modern decisions have held this to be an irregularity only to be taken advantage of on motion, and not upon demurrer (*a*). So, if a recognizance be taken before a judge, and not entered in Court, and the plaintiff declares upon a recognizance in Court, it is variance (*b*); and such variance cannot be amended, for the writ does not appear to the Court to be wrong, and there may be such a judgment (*c*).

Distinction in this respect, between a

In the case of the nonjoinder of a co-contractor there is a distinction between a *scire facias* to revive a judgment and an

(*t*) 2 V. Wms. Saund. 72*f*; Com. Dig. Plead, 3 L, 3; Com. Dig. tit. Bail, R, 2; 2 Tidd, 9th ed. 1105. As to the removal of a record, see *Fazakerly v. Baldoe*, 6 Mod. 178, and the cases noted in 2 Wms. Saund. 26, n. 1.

(*u*) *Guillam v. Hardesty*, 3 Salk. 320; S. C., 1 Ld. Raym. 216; 2 V. Wms. Saund. 72*f*, n.; Bac. Abr. tit. Scire Facias, D, 149.

(*v*) Com. Dig. tit. Bail, R, 2; Cro. Eliz. 855; *Mars v. Quin*, 6 T. R. 5, *per* Kenyon, C. J.

(*w*) 3 Mod. 227; Com. Dig. tit.

Pleader, 3 L, 3.

(*x*) R. Carth. 149; Com. Dig. tit. Plead, 3, L, 3.

(*y*) See *post*, book iv. as to Amendment.

(*z*) *Panton v. Hall*, 2 Salk. 598; 2 V. Wms. Saund. 72*b*, n.; *Rex v. Chapman*, 3 Anst. 811; Lut. 1280; Com. Dig. Bail, R, 7.

(*a*) *Swainsbury v. Pringle*, 10 B. & C. 751; *Fowler v. Rickerby*, 9 Dowl. P. C. 682.

(*b*) Com. Dig. tit. Plead, 3 L, 3.

(*c*) *Vavasor v. Baile*, 1 Salk. 52.

action of debt on the judgment, because a *scire facias*, although for some purposes considered in the light of an action, is also a continuation of the original action, and is a species of execution which should strictly follow the judgment on which it is founded; but, "an action of debt on a judgment being founded on the consequent duty, is not to be differed from the ordinary case of an action of debt against one of several joint contractors" (c), to which the proper and only objection which can be taken is by plea in abatement for the nonjoinder of the co-contractors (c).

scire facias,
and an
action on
the judg-
ment.

So, if a record on which a judgment is founded be binding on several parties *jointly and severally*, the *scire facias* may issue against all jointly (d), or against each severally (e); or the *scire facias* may be joint and the award of execution several: as, upon a recognizance of bail, the recognizance being joint and several, a *scire facias* may issue against the bail jointly or severally, calling upon *them or each of them* to show cause why execution "according to the force, form, and effect of the recognizance," should not be had (f).

A joint and
several
judgment.

And it has been held, that one *scire facias* in all such cases is sufficient, because the recognizance upon which the *scire facias* is founded being joint and several, and the purport of it being to have execution, according to the force, form, and effect of the recognizance, it therefore follows that although the *scire facias* be joint the execution may be several (g). But, where a *scire facias* against joint defendants, as against bail, "calls upon *them* (and not upon each by himself) to show cause why execution should not issue against *them* according to the force of the recognizance, the *scire facias* is to be taken to be a proceeding against the two jointly, though several executions may be awarded against the bail, because execution is prayed against them according to the force, form, and effect of

Execution
may be
several
though
scire facias
joint.

(c) *Re Cocks and others v. Brewer*, 11 M. & W. 51; S. C., 2 Dowl. N. S., 759; and see the notes to *Cabell v. Vaughan*, 1 V. Wms. Saund. 291 c.

(d) Bac. Abr. tit. *Scire Facias*, C; *Fort v. Oliver*, 2 M. & S. 217; Bac. Abr. tit. *Scire Facias*, D; 2 Salk. 598; Skin. 82, pl. 24.

(e) Bac. Abr. tit. *Scire Facias*, C, 2; 2 Inst. 395; 2 V. Wms. Saund. 71 e.

(f) Bac. Abr. tit. *Execution*, G; Com. Dig. tit. *Bail*, R, 11; *Gee and Wife v. Fane*, 1 Lev. 226. But there cannot be a joint judgment against bail on several writs of *scire facias*; *Villars v. Parry and Moor*, 1 Ld. Raym. 182; Bac. Abr. tit. *Scire Facias*, C.

(g) 2 V. Wms. Saund. 72 a, n.; 2 Tidd. 9th ed. 1099—1133; *Gee and Wife v. Sir F. Fane*, 1 Lev. 225; Com. Dig. tit. *Bail*, R, 2; Lut. 183.

the recognizance, which is several as well as joint; yet as the *scire facias* calls upon *them* to show cause, there can be no award of execution against either until both are before the Court; and the best books of practice appear to take it for granted that until both defendants are in Court, there can be no declaration against either" (*k*). So where a writ of *scire facias* was issued against fifteen members of a banking co-partnership to make them parties to a judgment obtained against the public officer of the bank, and twelve only of the fifteen were declared against, for which amongst other causes the declaration was demurred to; it was held on the authority of *Swainsbury v. Pringle*, that this variance between the process and the declaration was matter of irregularity which might be taken advantage of by applying to the Court, but that the objection could not be taken on demurrer, or be put on the record as an answer to the irregularity; as that was like saying that it amounted to an abatement of the writ, which was erroneous; as it would not be a good plea in abatement without showing that the omitted parties were alive at the time of the plea (*i*).

Reversal of judgment.

As the judgment in *scire facias* depends upon the original judgment, if this be reversed, the judgment in *scire facias* does not stand in force (*k*), but will be reversed in like manner (*l*).

Capias can not issue on a *scire facias* in mesne process.

A *scire facias* to revive a judgment being but the continuation of the former suit (*m*), no *capias* can issue upon it on which to arrest a defendant, upon an affidavit of his presumed intention to quit England, by order of a judge at chambers, the 5th section of the 1 & 2 Vict. c. 110, having enacted that such order shall only be granted "at any time after the commencement of such action, and before final judgment shall have been obtained therein" (*n*). And even in cases where it is to be looked upon as the commencement of a new action, no *capias* can be granted, as no such power existed in proceedings on *scire facias* before the 1 & 2 Vict. c. 110, and the 3rd section of that act con-

(*k*) *Swainsbury v. Pringle*, 10 B. & C. 751.

(*i*) *Fowler and others v. Rickerby*, 9 Dowl. 692, per Tindal, C. J.

(*k*) Com. Dig. tit. Pleader, 3 L. 18.

(*l*) *Dr. Drurie's case*, 8 Co. R. 141.

(*m*) 2 Tidd, 9th ed. 1096; ante, ch. i., p. 6; *Wright v. Nutt*, 1 T.

R. 388. In a recent case it has been doubted whether a *scire facias* will lie on an interlocutory judgment. The Court of Common Pleas refused to entertain the matter on motion; *Benn v. Greatwood*, 6 Scott, 891.

(*n*) *Accasiz and Wife v. Palmer*, 1 D. & L. 18.

fines this application to a judge to grant an order to hold the defendant to bail, and to sue out a writ of *capias* against him to such cases only as a defendant was at the time of the passing of that Act liable to be arrested upon (n).

It was formerly a question of doubt whether or no a *scire facias* to have execution on a judgment in ejectment was necessary, the decisions being conflicting (o). But it has now long been settled that "if there be judgment in ejectment and no execution sued thereon in a year and a day, an *habere facias possessionem* cannot be sued out after, without a *scire facias*" (p); for the words of the Statute of Westminster which gives this writ in personal actions are, "whether they be contracts, &c., *vel alia quaecunque irrotulata*," which comprehend all judgments, and give the like remedy on them by *scire facias* as the demandant had on a judgment in a real action at common law (q). If a plaintiff should issue execution after the lapse of a year and a day without first reviving the judgment by *scire facias*, the Court upon application will set it aside, and if executed order the possession to be restored (r). And an application to the Court for that purpose may, it seems, be made at any distance of time (s), and by a tenant in possession who has not appeared (s).

And even if the judgment be obtained against the casual ejector, so that the merits are not tried, a *scire facias* must issue to revive it after the lapse of a year and a day (t). In such a case it seems that the terre-tenant must be joined in the writ (u). In Ireland, it has been held not irregular to omit making the terre-tenants parties to the *scire facias*, but that it may be returned *nil* (x). So even where a mortgagee recovered the land in an ejectment against the heir of the mort-

(n) See last note.

(r) *Doe v. Lord*, 7 Ad. & E. 610.

(o) Com. Dig. tit. Execution, A, 5,
I, 4. Held necessary, 1 Sid. 351;
contra Salk. 258, 600.

(s) *Goodtitle d. Murrell v. Badtitle*,
9 Dowl. 1009.

(p) Bac. Abr. tit. Scire Facias, C;
7 Mod. 64, 66; 2 V. Wms. Saund.
72 d. n.; *Proctor v. Johnson*, 1 Ld.
Raym. 669; *Withers v. Harris*, 2 Ld.
Raym. 806; Ad. Eject. 346; *Doe d.*
Stephens v. Lord, 1 P. & D. 388;
Cook v. Cook, 3 Lev. 100, and see 6
M. & S. 179; *Putland v. Newman*,
per Bayley, J.; see *post*, bk. ii. ch. ix.

(t) *Doe d. Ramsbottom v. Roe*, 2
Dowl. N. S. 690.

(u) 2 Chit. Arch. 8th ed. 963; see
forms, Tidd's Forms, 721, 722; *Proctor*
v. Johnson, 1 Ld. Raym. 670;
806-808; see also 2 Tidd, 9th ed. 1249,
and the authorities there quoted;
Doe d. Ramsbottom v. Roe, 2 Dowl.
N. S. 690.

(x) *Pope v. Roe*, 1 Alcock & Napier, 43.

(q) 2 Tidd, 8th ed. 1154.

gagor, and after lying by, owing to a negotiation, more than a year and a day, without suing out a *scire facias*, issued a writ of *habere facias possessionem* under which the sheriff gave him possession, the writ was set aside for irregularity in being issued without the judgment being revived by *scire facias*; and if the lessor of the plaintiff will not restore the land of which he is thus in possession in right of his judgment, though a writ of restitution cannot be granted, yet the Court will not permit him to retain it (y).

Where
elegit
issued.

It was formerly held that if an *elegit* were not issued within a year and a day after the judgment, if there were continuances on the roll, it might be taken out at any time without issuing a *scire facias*; and it was said that this had been the constant practice for many years (z). But it has since been held that there is no difference in the nature of an *elegit* to furnish a different rule of practice to that which pervades all other executions (a), and that the lessor of the plaintiff must have a *scire facias* as in other cases (b). And it has been since held, in *Putland v. Newman* (a), by *Bayley, J.*, "that he could see no reason for any material distinction between the present and other cases; the mischief applying equally to one as to the other. If, as had been observed, an *elegit* were given by the Statute of Westminster the Second, so also a *scire facias* lay by the same statute."

A writ of
execution
issued after
a year,
without a
scire facias,
not void but
voidable.

It is laid down in some of the older authorities that "if the demandant sues execution after a year after judgment, he must have a *scire facias* (c); for if he sues a *capias ad satisfaciendum*, &c., after the year, without reviving the judgment by *scire facias*, it is not only erroneous, but void" (d). In some old cases, however, this doctrine was not assented to, and the writ of *ca. sa.* was said to be merely voidable by error, but not void (e). Thus, in *Martin v. Ridge* (f), the defendant was taken by a

(y) *Doe d. Stevens v. Lord*, 6 Dowl. 257.

(z) *Seymour v. Greenville*, Carth. 283; *S. C.*, Comb. 232.

(a) *Putland v. Newman*, 6 M. & S. 181.

(b) *Withers v. Harris*, 1 Salk. 258; *S. C.*, 2 Ld. Raym. 806; 2 V. Wms. Saund. 68 f; see *Rolt v. The Mayor, &c. of Gravesend*, 7 C. B. 777.

(c) Com. Dig. tit. Execution, A, 4.

(d) Com. Dig. tit. Execution, I, 4;

Russell's case, 4 Leon. 197; *Goodtitle d. Murrell v. Badtittle*, 9 Dowl. 1009; see *post*, book ii. ch. ix.

(e) Com. Dig. tit. Pleader, 3 L, 2; *Howard v. Pitt*, 1 Salk. 261; and see *Shirley v. Wright*, 1 Salk. 273; *Patrick v. Johnson*, 3 Lev. 403; 2 V. Wms. Saund. 6 a; *Cholmondeley v. Bealing*, 2 Ld. Raym. 1096.

(f) *Barnes*, 206; Bac. Abr. tit. Scire Facias, C.

ca. sa. issued after a year and a day from the time of the judgment, without any *scire facias* to revive it. The defendant brought his action for false imprisonment, and the plaintiff justified under the *ca. sa.* The defendant then applied to set aside the *ca. sa.*, and it appearing that a *capias ad respondendum* only had been obtained in an action of debt on the same judgment, and that a *ca. sa.* had not issued within the year, there was nothing to warrant the continuance of a *ca. sa.* on the roll. The rule was therefore made absolute to set aside the *ca. sa.* The case of *Mortimer v. Pigott* (g) threw some doubt on these prior decisions, the Court of King's Bench making a rule absolute for discharging the defendant out of custody, on the ground that the judgment on which the execution issued, and on which he was charged in custody, had been signed more than a year before the issuing of such execution, and had not been revived by *scire facias*, or otherwise kept on foot. It appeared that, from 1821 to 1834, the defendant had been in custody without making any effort to obtain his liberty, and the Court, in deciding that the lapse of time did not bar the right of the defendant to avail himself of the objection, held that the proceeding of the plaintiff was a nullity as contravening the direct words of the statute. The case of *Blanchenay v. Burt and others* (h) has, however, re-established the authority of *Howard v. Pitt*, *Shirley v. Wright*, and *Patrick v. Johnson* (i), the Court of Queen's Bench having reviewed its decision in *Mortimer v. Pigott*, and held that the defect of not reviving the judgment after a year and a day by *scire facias* amounts only to an irregularity of which the opposite party might take advantage by writ of error; or, on application to the Court, the writ of *ca. sa.* might be set aside; but it is not a mere nullity.

In another case (k) it has been held, that where a defendant, in custody at the suit of some other party than the plaintiff, was brought up by the plaintiff by *habeas corpus*, and charged in execution, when more than a year and a day had elapsed since the signing of the plaintiff's judgment, the plaintiff could not regularly do so without reviving his judgment by *scire facias*, or showing that he took out execution within a year from the signing of the judgment; and that if this were

When
irregular.

(g) As reported in 2 Dowl. 615;

(i) Note (e), *ante*, p. 24.

but see the same case reported in 4 Ad. & E. 363.

(k) *Smith v. Sandys*, 3 Ad. & E. 693; *S. C.*, 5 Nev. & M. 59; 1 Har.

(h) 4 Q. B. 707.

& W. 377.

not done the plaintiff's proceedings would be irregular: and the Court will make a rule absolute, to discharge a defendant out of custody in such a case. So a *fi. fa.* upon a dormant judgment before revival is irregular; and a second *fi. fa.* may be taken out and executed after revival, although the first which issued before is not returned or quashed (*l*).

So, where an outlaw has been arrested on a *ca. sa.*, issued pursuant to a judgment more than a year old, but which has not been revived by *scire facias*, he may apply to be discharged out of custody notwithstanding the outlawry, as the latter proceeding only prevents his availing himself of the benefit of the law against others, but does not prevent him from protecting his person from wrongful restraint (*m*).

But if judgment is signed in an inferior Court after a year and a day, without being revived by *scire facias*, it seems that a defendant cannot obtain a *habeas corpus* for his discharge out of custody, as no *certiorari* can issue to bring up the record of an inferior Court after judgment (*n*).

What
amounts to
waiver of
irregularity.

But where a writ of *scire facias* has been sued irregularly, to which an appearance has been entered by the defendant, and the plaintiff has delivered a declaration to which a plea is delivered, pending a motion to set aside the writ the defendant's plea is a waiver of the irregularity (*o*).

When
plaintiff
may quash
his own
writ.

If there be any irregularity in the writ, and the defendant has appeared to it, the party suing it out may have leave to quash it on payment of costs (*p*). Any want of uniformity of practice in the Courts on this point was remedied by R. G. H. T. 2 Will. IV. s. 78, whereby it was ordered that, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias* after a defendant has appeared, except on payment of costs." And it has since been held that this rule is *nisi* in the first instance (*q*); but as it is a matter of right for the plaintiff to quash his own *scire facias* on payment of costs, the Court will not make the payment of costs of a *cassetur breve* in an action brought on the judgment during the pendency of the *scire facias* a condition precedent (*q*).

(*l*) *Anon.* 1 Ld. Kenyon, 120.

(*m*) *Walker v. Thelkison*, 1 Dowl. N. S. 277.

(*n*) *Kemp v. Balne*, 1 D. & L. 885.

(*o*) *Sloman v. Gregory*, 1 D. & R. 181.

(*p*) *Pickman v. Robson*, 1 B & A.

486.

(*q*) *Ade v. Stubbs*, 4 Dowl. 282; *Oliverson v. Latour*, 7 Dowl. 605; S. C., 2 W. W. & H. 54. As to the cases in which any error or irregularity in the writ may be amended, see *post*, book iv. tit. Amendment.

When judgment has been revived by *scire facias*, if the plaintiff do not take out execution within a year after such revival (*r*), he must either sue out a new *scire facias*, or bring his action on the judgment, before execution can be sued out (*s*). New *scire facias*, when necessary.

If a judgment has been more than once revived by *scire facias*, the *scire facias* last issued should recite the previous *scire facias* on the same judgment, although it may not have been returned and filed (*t*); otherwise, for aught that might appear to the contrary, the original judgment might have been in part discharged, under proceedings taken on the judgment revived by the first *scire facias* (*u*). Must recite previous *scire facias*.

If, after judgment, the plaintiff within the year unnecessarily sues out a *scire facias*, he cannot afterwards have a *capias* within the year till he has a new judgment in the *scire facias* (*x*). When unnecessarily sued out.

And where a *scire facias* has been unnecessarily sued out, and the defendant's attorney proposes terms of compromise, on which the defendant acts for a time, the defendant cannot afterwards object to pay the costs of such unnecessary *scire facias*; the treaty made by the attorney, and acted on, binding the client even as to these costs, admitting the *scire facias* to be unnecessary (*y*).

Upon a motion to revive an old judgment by *scire facias*, the validity of the judgment cannot be impeached for the purpose of opposing that motion, but a separate application must be made to set aside the judgment, as the judgment must be considered regular till it has been set aside (*z*). Judgment cannot be impeached on motion to revive an old judgment.

Where an interlocutory judgment has been obtained, and the plaintiff delays executing a writ of inquiry for more than a year, he cannot proceed further without suing out a writ of *scire facias* to revive the judgment (*a*).

(*r*) 2 Crom. 3rd ed. 97, 103.

(*s*) 2 Tidd. 8th ed. 1158; 9th ed. 1106; 2 V. Wms. Saund. 72*f*; 2 Chit. Arch. 1033; *O'Brian v. Ram*, 3 Mod. 189; *Rastell's Entries*, 193; *Barnard v. Tusser*, 4 Leon. 186; *Barnard and Sugser's case*, Dyer, 214 *b*; *Fitzherbert's Natura Brevium*, 122, Writ of Debt; *Farran v. Berresford*, 10 Cl. & Fin. 334.

(*t*) See form, Chit. Forms, No. 18, p. 447; Tidd's Forms, p. 493.

(*u*) *Walker v. Thellusson*, 1 Dowl. N. S. 578, overruling *Klos, Ass. of*

McDowall, v. Dodd, 467; and see Bac. Abr. tit. Execution, D, and *Mellor v. Powell*, 2 Marsh. 78.

(*x*) Bac. Abr. tit. Scire Facias, C; 2 Tidd. 8th ed. 1154; 9th ed. 1103; 1 Roll. Abr. 900.

(*y*) *Brewster v. Meaks*, 2 Dowl. 612.

(*z*) *Thomas v. Williams*, 3 Dowl. 655.

(*a*) *How v. Acton*, 12 Mod. 500; *Peyton v. Burdus*, 2 Stra. 1100; 2 Tidd's Prac. 8th ed. 1154; Bac. Abr. tit. Scire Facias, C, p. 133.

It has, however, been doubted whether a *scire facias* will lie upon an interlocutory judgment. The Court will not entertain the matter on motion, Lord Chief Justice Tindal, in *Beau v. Greatwood* (b), observing that "this was much too grave a question to be determined on motion; and that there being a dictum of Lord Holt in favour of the course pursued by the plaintiff (in suing out a *scire facias* in order to obtain his costs on an interlocutory judgment, on which no proceedings had been taken for more than a year), the defendant must be left to his remedy by writ of error.

Plaintiff
may be
nonsuited.

If the plaintiff be under any legal disability, he cannot sue out a *scire facias*, as if he be a British subject, and reside in an enemy's country without being detained as a prisoner of war (c); or if he be an outlaw, in which case he can only appear in Court for the purpose of reversing his outlawry (d), and not to take any benefit of the law: in these cases if the plaintiff sue out a *scire facias*, it would seem from the case of *O'Mealey v. Wilson* that he must be nonsuited (e).

Writ of
error on, lies
to Exche-
quer Cham-
ber.

Formerly, no writ of error lay into the Exchequer Chamber on a judgment given in the King's Bench on a *scire facias*, but only into Parliament, the Statute 27 Eliz. c. 8, s. 2, which gives the writ of error into the Exchequer Chamber, mentioning only "actions of debt, detinue, covenant, account, actions upon the case, ejectment or trespass" (e); and in the construction of this statute, it was held that the statute was confined to the seven particular actions enumerated therein (f). But the law has recently been materially altered in this respect, and writs of error "upon any judgment," whether given by the Courts of Queen's Bench, Common Pleas, or Exchequer, are "made returnable only before the judges, or judges and barons as the case may be, of the other two Courts, in the Exchequer Chamber, any law or statute to the contrary notwithstanding-

(b) 6 Scott, 891.

(c) *O'Mealey v. Wilson and another*, 1 Camp. 482.

(d) *Walker v. Thelluson*, 1 Dowl. N. S. 277; *per* Wightman, J., "The Court cannot allow an outlaw to take any benefit of the law." *Lukes v. Holbeche*, 1 M. & P. 126; *Somers v. Holt*, 8 Dowl. 506, where proceedings by plaintiff in an action of libel were stayed till his outlawry was reversed; *Aldridge v. Buller*, 2 M. &

W. 412, where held that "an outlaw cannot appear in Court for any purpose but to reverse his outlawry."

(e) 2 V. Wms. Saund. 71 a.

(f) 2 V. Wms. Saund. 101 c, n.; *Nevill v. South*, Cro. Car. 286; *Lancaster v. Keyleigh*, Cro. Car. 300; *Anon. ib.*, 464; *Vaughan v. Williams*, Cro. Jac. 171; *Sandelow v. Deverton*, Cro. Jac. 384; *Hartop v. Holt*, Salk. 263.

ing (A). This statute has been held to extend to a judgment against a defendant on an indictment in the Queen's Bench, and that the Court of Exchequer Chamber has jurisdiction upon criminal as well as civil cases, when brought before it by writ of error (i). And it also applies to judgments given in the Court of Queen's Bench on error from a Court below; Tindal, C. J., holding in a late case "that the words of the 8th section of 11 Geo. IV. & 1 Will. IV. c. 70, are free from all ambiguity. In terms they extend to 'any judgment given by any of the three superior Courts at Westminster. These words, in themselves, include not only judgments in causes originally commenced in such Courts, but all judgments given by those Courts' (k). It would appear, therefore, that a judgment on a *scire facias* is now revisable on error in the Exchequer Chamber.

It has been seen that in the case of the Crown a *scire facias* is not in all cases necessary, the principle of "*nullum tempus occurrit regi*" applying; and though it is the practice to issue the writ before having execution, where there is any doubt about the debt, and where the debtor is solvent; yet if the debt is unquestionable and in danger from the insolvency of the debtor or otherwise, an immediate extent in chief may issue on the judgment without the intervention of a *scire facias* (l). In the case of the Crown.

There are also several exceptions in which it is not necessary to issue this writ when more than a year has expired after judgment, which have already been referred to (m), and which will be found more fully treated of in the subsequent chapter on the exceptional cases in which this writ is not necessary (n).

The omission to sue out a writ of *scire facias* when from lapse of time such a writ is required, is a ground of error, which is apparent on the face of the record (o). Omission to sue out writ, when required, ground of error.

By the 3 & 4 Will. IV. c. 27, s. 40, not *scire facias* can be sued out to revive a judgment, unless within twenty years next after a present right to receive the sum due on the judgment shall have accrued, unless in the mean time there shall have been Limitation of the writ.

(A) 11 Geo. IV. & 1 Will. IV. c. 70, s. 8, an Act "for the more effectual Administration of Justice in England and Wales."

(i) *Rex v. Wright*, 1 Ad. & E. 434.

(k) *Nesbit v. Rishton*, 9 Ad. & E. 426; S. C., 2 P. & D. 706.

(l) See *ante*, ch. i. p. 10; and see *post*, book iii. chaps. vii. & viii.; Bac. Abr. tit. Execution, K; *Id.* tit. Prerogative, E, 6.

(m) Ch. i. p. 8.

(n) *Post*, book i. ch. vii.

(o) *Goodtitle d. Murrell v. Badtittle*, 9 Dowl. 1009.

some acknowledgment of the debt in writing, part payment on account, or payment of interest; and no proceeding shall be brought in such case but within twenty years after the last payment or acknowledgment; and the same period of limitation is given to a recognizance by the 3 & 4 Will. IV. c. 42, s. 3, which cannot be revived by *scire facias* after twenty years have elapsed (*p*).

But if payments on account have been made within twenty years, a judgment more than twenty years old may be revived by *scire facias* (*q*). And if within twenty years a judgment is revived by *scire facias*, a *new right* is acquired by such judgment (*r*), from which new right the limitation of twenty years begins to run, and not from the original judgment (*s*). Such previous *scire facias* must however be set forth in the declaration in *scire facias*; otherwise if more than twenty years have elapsed since the original judgment, a plea of the statute would be a good plea in bar, and a replication setting out the previous *scire facias* and revival of the judgment within twenty years would be a departure, as setting up a new right, and would be bad (*t*).

Practice.

As to the practice on issuing a *scire facias* on judgments above seven and under ten years old, above ten and under fifteen years old, and above fifteen years old, see *ante*, Ch. I. (*u*).

The forms of the *præcipe* for the writ, and of various precedents, will be found in Chitty's Forms, p. 442 *et seq.*; Tidd's Forms, pp. 493, 522 *et seq.* (*x*)

(*p*) See *ante*, ch. i. p. 14. "The legal as well as the natural presumption being that if a creditor lies by for twenty years his demand has been satisfied," *per* Ld. Brougham in *Farran v. Beresford*, 10 Cl. & Fin. 330.

(*q*) *Williams v. Welsh*, 1 Ball Court Rep. (Saund. & Cole), 69.

(*r*) *Farran v. Beresford*, 10 Cl. & Fin. 319.

(*s*) *Farrell v. Gleeson*, 11 Cl. & Fin. 702. "A judgment was obtained in 1813. It was revived by *scire facias* in 1828. A bill was filed in 1838 in the Court of Exchequer in Ireland against the representatives of the debtor, praying for an account, and

that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. Plea of the Statute of Limitations (3 & 4 Will. IV. c. 27, s. 40). Held, on appeal to the House of Lords, that the *scire facias* created new rights, and the plea was no bar to the suit."

(*t*) *Farran v. Beresford*, in error, in the House of Lords, 10 Cl. & Fin. 319.

(*u*) P. 14; and see *Hardesty v. Barney*, 2 Salk. 598. See forms of affidavit, &c., for leave to sue out a writ of *scire facias* on a judgment above ten and under twenty years old, Chit. Forms of Prac. 442.

(*x*) See *post*, Append.

CHAPTER III.

TO RECOVER DEMANDS ARISING AFTER JUDGMENT
IN DEBT ON BONDS.

Depend on the Stat. 8 & 9 Will.

III. c. 11, s. 8, p. 32.

Judgment to remain as a further Security to answer future Breaches, p. 32.

The Common-law Rule, p. 33.

The Statute extends both to Bonds with Conditions thereunder and to Bonds with Covenants and Agreements in some other Indenture or Deed, p. 34.

To what Cases the Statute does not extend, p. 34.

All Cases in which Computation only is necessary are not within the Statute, p. 35.

But are relieved by the 4 Anne, c. 16, ss. 12, 13, p. 35.

Is confined to Actions of Debt for the Penalty, p. 37.

The Bond only a Security to the Amount of the Penalty, p. 37.

Cases to which the Statute applies and where a Scire facias is necessary, p. 37.

Proceedings on, p. 38.

The Jury, though summoned only

on the common Venire, must assess Damages on Breaches assigned, p. 39.

The Damages bounded by the Amount of the Penalty of the Bond, p. 39.

The Statute compulsory as to Proceedings in all Cases within it, p. 40.

Scire facias, on further Breach of Condition of Bond contained in another Instrument, p. 41.

On further Breaches of Conditions and Agreements contained in same Instrument, p. 42, et seq.

Scire facias for further Breach in Non-payment of an Annuity, p. 43.

Scire facias for further Breach in Non-payment of further Instalments, p. 44.

As to Assignment, and Suggestion of Breaches, p. 44.

When must assign, p. 45.

When must suggest, p. 45.

Costs on Scire facias, p. 46.

IN the present chapter it is proposed to treat of those cases where a *scire facias* is necessary to recover demands which arise after judgment has been obtained, in debt on bonds.

These cases are governed by the equitable statute of 8 & 9 Will. III. c. 11, s. 8, which directs that in all actions upon

Depend on
the statute
8 & 9 Will.

III. c. 11, s. 8. bonds, or on any penal sum for the non-performance of covenants or agreements, breaches shall be assigned by the plaintiff on which a jury shall assess the damages that have arisen, for *which sum only* judgment may be entered, and not for the whole penalty of the bond, as was formerly the case at common law; and on payment of this sum, together with the costs of suit, a stay of execution is to be entered. The statute then provides that in each case the judgment, notwithstanding, shall remain as a *further security* to answer the plaintiff for such damages as may be sustained *for any further breach of covenants or agreements* contained in the condition of the bond, or in any other indenture or collateral deed, containing a defeasance of the bond (a); upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, suggesting other and subsequent breaches of the said covenants or agreements, and summoning him to show cause why execution should not be had for the said breaches upon the said judgment, upon which there shall be the like proceeding as there was in the action of debt upon the said bond, and on payment of such future damages, with the costs of suit, all further proceedings on the judgment are again to be stayed, and so *toties quoties* (b).

Judgment to remain as a further security to answer further breaches.

(a) As to the distinction between a “*defeasance* and a *condition*,” and the requisites of a defeasance, which must be of as high a nature as the instrument to be defeated, see notes to *Powell v. Forrest*, 2 V. Wms. Saund. 47 ff; *Hayford v. Andrews*, Cro. Eliz. 697; 2 Bla. Com. 341. “A defeasance is an instrument which defeats the force or operation of some other deed or estate; and that which in the same deed is called a condition, in another deed is a defeasance;” Com. Dig. tit. Defeasance, A.

(b) The following is the 8th section of this Act: “That in all actions which shall be commenced or prosecuted in any of his Majesty’s courts of record, upon any bond or bonds, or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign

as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, *shall and may assess* not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices, or justice of assize or *nisi prius*, of that

At common law, the judgment for the plaintiff in debt on bond was, in all cases, that he should recover the penalty (c). And before this statute passed, in cases where the bond was conditioned not for the payment of money, but for the doing of some collateral act, the plaintiff not only had judgment to recover the penalty of the bond together with his costs, but was also entitled to take out execution *for the whole* without any regard to the damage which he had actually sustained by the non-performance of the act which the defendant had covenanted or agreed to do (d). This state of the law then often

The common-law rule.

county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or *nisi prius*, that he or they shall make a return thereof to the Court from whence the same shall issue, at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto the Court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record, or if by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses, for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding in each case such judgment shall remain, continue, and be as a further security, to answer to the

plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation, for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid, of such future damages, costs, and charges, as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands or goods, shall be discharged out of execution, as aforesaid."

(c) *Goodwin v. Crowle*, Cowp. 358; *Drage v. Brand*, 2 Wils. 377; *Hardy v. Bern*, 5 T. R. 636.

(d) See n. 1 to *Gainsforth v. Griffith*, 1 V. Wms. Saund. 57.

forced the defendant into expensive suits in equity for relief (e).

The statute extends both to bonds with conditions thereunder, and to bonds, with covenants and agreements in some other indenture, or deed.

It has been held that this statute extends as well to bonds with conditions thereunder written for the performance of anything contained therein, and to penalties on articles of agreement or the like for the non-performance of covenants or agreements contained in the same articles, &c., as to covenants and agreements contained in another indenture, deed, or writing (f), provided "the purposes of the bond are declared by an instrument of as high a nature executed on the same day" (g).

To what cases the statute does not extend.

This statute has been held not to extend to bail bonds (h); or replevin bonds (i); or to the bonds formerly given by a petitioning creditor on suing out a commission of bankrupt (k); or to common money bonds (l), against the penalty of which the Courts give relief to defendants by stat. 4 Anne, c. 16, s. 13, on payment of principal, interest, and costs into Court, which may then give judgment for the defendant; or to *post-obit* bonds (m); or to a bond for replacing stock (n), computation only being requisite without the intervention of a

(e) *Collins v. Collins*, 2 Burr. 824. The Courts however, in some cases, made rules restraining the execution on the judgment beyond the arrears due; see *Filby v. Best*, 16 East, 168; 2 Bla. 843; *Ogilvie v. Foley*, 2 Bla. 1111; *Bridges v. Williamson*, 2 Stra. 814; *Darby v. Wilkins*, 2 Stra. 958; *Masfen v. Touchet*, 2 Bla. 706; *Gowlett v. Hanforth*, 2 Bla. 958; but see *contra*, *Land v. Harris*, 1 Stra. 515; see *post*, 41, n. (u); and see note to *Gainsford v. Griffith*, 1 V. Wms. Saund. 58. "The Act was made in favour of defendants, and is a remedial law calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payments of further sums than are in conscience due, and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty in cases where small damages only

have accrued;" *Hardy v. Bern*, 5 T. R. 637.

(f) 1 V. Wms. Saund. 58, n. 1; and see *post*, 41; *Hurst v. Jennings*, 5 B. & C. 650.

(g) *Hurst v. Jennings*, 5 B. & C. 659, *per* Littledale, J.

(h) *Moody v. Pheasant*, 2 B. & P. 446; *Selby v. Lewis*, 1 Tidd's Prac. 633.

(i) *Middleton v. Bryan*, 3 M. & S. 155; because the Courts of law can give relief to defendants in these cases, 1 V. Wms. Saund. 58, n. (b).

(k) *Smithey v. Edmondson*, 3 East, 16.

(l) *Smith v. Bond*, 3 M. & S. 528; 10 Bing. 125; *James v. Thomas*, 5 B. & Ad. 40; 2 Nev. & M. 663; *Howell v. Stratton*, 2 Sm. 65; 2 Moore, 220.

(m) *Warden v. Fermor*, 2 Camp. 285, n.; *Cardozo v. Hardy*, 2 B. Moore, 220; *Murray v. Earl of Stair*, 2 B. & C. 82.

(n) *Savill v. Jackson*, 13 Pri. 715.

jury (o). And a warrant of attorney has been held not to be within the statute, though conditioned to pay money by instalments, or to secure the payment of an annuity (p). Nor is the Crown bound to pursue the statute (q).

The principle on which these decisions go, and on which it is held that these cases are not within the 8 & 9 Will. III. c. 11, s. 8, is well explained in the case of *Murray v. The Earl of Stair* (r). Wherever a bond is given for the payment of a sum certain, at a day certain, and where the whole sum that the plaintiff can ever become entitled to is due at one time, then it is not within the statute of Will., for in order to ascertain the precise sum due in such a case, computation only is necessary, and the intervention either of a jury or a court of equity is unnecessary (s). In all those cases, therefore, where the debt or damages can be computed without the aid of a jury, though the judgment is for the penalty of the bond, which may be, and generally is double the amount of the debt secured thereby, and which becomes forfeited at law on non-payment at the time fixed, or breach of the condition, yet on payment of the principal and interest due at any subsequent time, such payment may be pleaded in bar, as if the money had been paid according to the condition; and if paid during the trial, together with the costs of suit, such payment is a discharge of the bond under secs. 12 & 13 of 4 Anne, c. 16 (t). "The main object of the legislature was to make it unneces-

All cases where computation only is necessary, are not within the statute.

But are relieved by the 4 Ann. c. 16, ss. 12, 13.

(o) See *Smith v. Bond*, 10 Bing. 125; *James v. Thomas*, 5 B. & Ad. 40; 1 V. Wms. Saund. 58 a, n.

(p) *Cox v. Rodbard*, 3 Taunt. 74; *Kinnarsley v. Mussen*, 5 Taunt. 264; *James v. Thomas*, 5 B. & Ad. 41, per Littledale, J. "In the case of a warrant of attorney the Court never holds a party entitled to relief under the statute;" *Shaw v. Worcester*, 4 Bing. 385; 4 M. & P. 21; *Shaw v. Marquis of Worcester*, 6 Bing. 585.

(q) Per Alexander, C. B., in *Rex v. Peto*, 1 Y. & J. 171.

(r) 2 B. & C. 90.

(s) Per Abbott, C. J., *ib.*

(t) The following are the sections of the stat. 4 Anne, c. 16, ss. 12, 13:—Sect. 12. "And be it further enacted by the authority aforesaid,

that from and after the first day of Trinity term, where any action of debt shall be brought upon any single bill, or where action of debt or *scire facias* shall be brought upon any judgment, if the defendant hath paid the money due upon such bill or judgment, such payment shall and may be pleaded in bar to such action or suit, and where an action of debt is brought upon any bond which hath a condition of defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have before the action brought paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond,

sary for parties to go into a court of equity to obtain relief. Now where the penalty was a security for the doing of several acts, it became the debt at law by the non-performance of any one; and it was necessary to apply to a court of equity for relief, which was granted upon the terms of paying what was due in conscience" (u). But wherever, upon the first breach, all that *may* become due is not payable, as in the case of an annuity or money payable by instalments, then justice requires that the party should recover only what is due, which cannot be ascertained without a suggestion, and also that the security of the bond should remain for what may become due; and wherever the damages are unliquidated and must be ascertained by the verdict of a jury, as in the cases of breaches of covenant, there also a suggestion is necessary under the statute of Will. (x).

The operation of the statute is confined to actions of debt; and though such payment was not made strictly according to the condition of defeasance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded."—Sect. 13. "And be it further enacted by the authority aforesaid, That if at any time pending an action upon any such bond with a penalty the defendant shall bring into the Court where the action shall be depending all the principal money and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the Court shall and may give judgment to discharge every such defendant of and from the same accordingly."

(u) *Per* Holroyd, J., 2 B. & C. 92.

(x) *Id. per* Beat, J. A question often arises whether a sum stipulated to be paid on breach of any covenant

or agreement shall be considered as a penalty or as stipulated damages. In the one case the real amount of damage only as assessed can be recovered; in the other, the amount stipulated as the damage. It seems now settled that where the same sum is stipulated as recoverable for the breach of every article in an agreement, however minute and unimportant, it shall be regarded as a penalty and not as liquidated damages, although the agreement declares affirmatively that the same shall be taken as liquidated damages and not as a penalty; 1 V. Wms. Saund. 58 c, n. (d); *Davies v. Penton*, 6 B. & C. 216; *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678; *Boys v. Ansell*, 5 Bing. N. C. 390. But where parties, by their mutual agreement, settle the amount of damages *uncertain in their nature* in respect of the performance or omission of a particular specified act at any sum upon which they may agree, such sum may be recovered as liquidated damages; 6 Bing. 148; 2 T. R. 32; *Duckworth v. Alison*, 1 M. & W. 412; *Leighton v. Wales*, 3 M. & W. 545.

a judgment obtained in assumpsit or covenant, (which actions sound in damages,) is available only for the damages awarded therein by the jury, and no more, and cannot possibly stand as a security for future breaches; and no *scire facias* can issue upon it therefore to revive its effect upon subsequently accruing demands or breaches of covenants or agreements (y), as there is no penalty against which a court of equity could relieve, but merely a breach of agreement for which the jury have awarded adequate damages (z).

Is confined to actions of debt for the penalty.

The bond in all cases is only a security to the amount of the penalty, and on payment of the penalty and costs into court, the plaintiff must acknowledge satisfaction on the record (a). Replevin bonds are no exception to the rule where the penalty is only double the value of the goods distrained, although the plaintiff's costs in the replevin suit much exceed the penalty; and the plaintiff cannot recover more than the penalty and costs of suit on the bond (b).

The bond only a security to the amount of the penalty.

But if judgment be recovered on a bond, in an action of debt on the judgment, interest may be recovered in damages beyond the penalty of the bond (c). And where the penalty is contained in any other instrument than a bond, damages may be recovered beyond it; for the plaintiff has his option to sue either for the penalty or for the breach of contract (d).

We will proceed now to notice those cases in which, on further breaches or demands taking place, or accruing after judgment, a *scire facias* is requisite to recover them, under the stat. 8 & 9 Will. III. c. 11.

Cases to which the statute applies, and where a *scire facias* is necessary.

Wherever a bond has been given for the performance of any covenants or agreements, or for the payment of money by instalments, or for the payment of an annuity, the statute of Will. III. then applies; and on breach of the covenants or agreements, or nonpayment of any of the instalments, or on failure in paying the annuity, the penalty of the bond becomes forfeited, and in an action of debt thereon, the breaches of

(y) See 1 V. Wms. Saund. 58 b, c, n. (d).

(z) *Lowe v. Peers*, 4 Burr. 2229.

(a) *White v. Sealy*, 1 Doug. 49; and see *Wilde v. Clarkson*, 6 T. R. 303; see *post*, p. 39.

(b) *Branscombe v. Scarborough*, 6 Q. B. 13.

(c) *McClure v. Dunkin*, 1 East,

436; *Crafts v. Wilkinson*, 4 Q. B. 74; and see 1 & 2 Vict. c. 110, s. 17.

"Such interest may be levied under a writ of execution on such judgment."

(d) *Winter v. Trimmer*, 1 Bla. 895; *Harrison v. Wright*, 13 East, 343; 1 V. Wms. Saund. 58 b.

covenant or agreement, or the amount of instalment or annuity not paid, must (e) be assigned or suggested. On judgment being entered for the plaintiff, it is then in force for such amount as a jury shall find due to the plaintiff on such assignments or suggestions; and when this claim shall be satisfied, together with the costs of suit, satisfaction must be entered on the roll for such claim, and the defendant is discharged therefrom: but instead of being compelled on any future breach of such covenants or agreements, or nonpayment of the stipulated instalments or annuity, to resort again to another action of debt, upon the judgment, which is by this statute made a continuing security against future breaches (and as it would be unjust to the defendant that execution should at any time again issue on such continuing judgment, without his having opportunity of answer, as the whole mischief of the old common-law rules would be then let in, and the whole amount of the penalty might be at any time levied, irrespective of the damages,) the plaintiff may issue a *scire facias* to revive the judgment, suggesting such further breaches, or nonpayments, and calling on the defendant to show cause why execution should not again issue for these claims, for which the previous judgment remains and continues as a further security. On these claims being again satisfied, a stay of execution is again entered on the roll and the defendant is again discharged; and so on as the claims may continue to arise on further breach or nonpayment. The defendant pleads to the breaches assigned; and the issues joined thereon are tried in the same manner as other issues. At the trial, if the plaintiff succeed on the issue, the jury must find a verdict for him with 1s. damages and 40s. costs as before; and *must also* assess damages (f) upon such of the breaches as the plaintiff shall prove (g).

Proceedings
on.

(e) *Roles v. Rosewell*, 5 T. R. 541. And it is held that the words "may assign" and "may suggest" are to be read "must assign" and "must suggest," the statute being compulsory as being made for the benefit of defendants; 1 V. Wms. Saund. 58, n.; and see cases noted in 1 Chit. Jun. Pleading Precedents, p. 423, tit. Declaration in Debt, Bonds; *Steward, P. O. v. Greaves and others*, 2 Dowl. N. S. 489; see *post*, p. 40, n. (g).

(f) See *Hardy v. Bern*, 5 T. R. p. 637, and *post*, p. 40.

(g) 1 V. Wms. Saund. 58 d; but see *Quin v. King*, 1 M. & W. 46. The words of the statute, *ante*, n. (d), 32, where breaches are assigned, are that "the jury upon trial of such action shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issues

The jury have authority under the statute to assess damages on all breaches *assigned* in the declaration or replication, though summoned only on the common *venire ad triandum* (*h*); but where the breaches are subsequently *suggested* on the roll, a special *venire* is required to enable them to inquire into the truth of the breaches, and to assess the damages the plaintiff shall have sustained thereby. The Court of Exchequer holding in *Quin v. King* (*i*) that "there are two classes of cases contemplated by the statute, one in which breaches may be *assigned* in the declaration, the other in which they may be *suggested* on the roll; if they are *assigned* the jury may assess (*k*) the damages without a special *venire*, but where they are *suggested* there ought to be a special *venire* to enable them" (*l*).

The jury, though summoned only on the common *venire*, must assess damages on breaches assigned.

If the damages and costs are not paid, the plaintiff sues out a writ of execution (a *fi. fa.*, *ca. sa.*, or *elegit*, as the case may be) to levy the debt and costs recovered by the judgment; which is indorsed to levy the damages assessed for the breaches of covenant, the costs found by the jury, the costs of suit, together with all reasonable charges and expenses for executing the writ; the amount of the damages, and the charges for executing the writ, are however bounded by the amount of the penalty of the bond, beyond which the plaintiff cannot levy (*m*). The costs of suit are *ultra* the penalty, and may therefore be levied as well as the penalty (*m*). The amount levied on each occasion, on proceedings on *scire facias*, must be entered upon the record, that it may appear when the amount of the penalty has been levied (*m*). The *scire facias* ought to recite the whole pro-

The damages bounded by the amount of the penalty of the bond.

shall prove to have been broken." And where the breaches are *suggested* on the roll a special *venire* is to issue; and the words of the statute are, that the jury is "to inquire into the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby."

(*h*) *Parkins v. Hawkshaw*, 2 Stark. N. P. 381; *Quin et Uxor v. King*, 1 M. & W. 44; *Draze v. Brand*, 2 Willes, 377.

(*i*) *Ubi supra*; and see *Scott v. Staley*, 6 Sco. 598; 4 Bing. N. C. 724; 6 Dowl. 714, S. C., where the judgment in *Quin v. King* is held by Tindal, C. J., and the Court of C. B. to be "conclusive."

(*k*) I. e. "must assess;" see *post*, p. 40; *Hardy v. Bern*, 5 T. R. 637.

(*l*) But, unless the defendant were prejudiced by an error in the jury process, the Court would not interfere. And even if they were to grant a rule *nisi* to set aside the trial and all proceedings subsequent to it, on the ground of irregularity, the plaintiff might apply to amend the jury process; *Wood v. Peyton*, 2 D. & L. 441.

(*m*) *Ante*, p. 37; 1 V. Wms. Saund. 58 e, n.: 2 Chit. Arch. 903, 8th ed.; *Branguin v. Parrott*, 2 Bla. 1190; *Wilde v. Clarkson*, 6 T. R. 303; *Shutt v. Proctor*, 2 March, 227; *Overseers of St. Martin v. Warren*, 1

ceedings in the former action, or at least so much thereof as to make it appear that the judgment is warranted by the statute. It must then suggest the further breaches; and the same proceedings are to be pursued under the *scire facias* as in the original action; but it is not necessary that there should be any other judgment than the usual one in a *scire facias*, of an award of execution (n).

The plaintiff cannot in the *scire facias* sued out upon the judgment under this statute, suggest as a breach anything which he might have originally assigned or suggested as a breach (o).

It is said to have been adjudged at common law, that in covenants perpetual where a demand arose from any breach, after action of covenant brought and recovery had thereon, if the covenants were afterwards broken a *scire facias* should be had on the judgment, and that the plaintiff need not bring a new writ of covenant (p). The decision in *Cro. Eliz.*, however, is not very positive; and it is better now to confine attention to the operation of the statute, 8 & 9 Will. III., which makes the *scire facias* necessary to recover further demands after judgment, and to the cases decided thereon.

The statute is compulsory, as to proceedings in all cases within it.

In all cases to which the statute applies, it is compulsory on the plaintiff to follow its provisions, and either to assign breaches in his declaration or replication, or to suggest them on the roll, according to the nature of his case, or the state of the pleadings (q). In *Hardy v. Bern* (r) the written opinion of Buller and Kenyon, Justices, is given on a writ of error from the Court of Exchequer, in which those learned judges held—"We are of opinion that it is not in the power of a plaintiff to refuse to proceed according to the statute in cases

B. & A. 491; *Lonsdale v. Church*, 2 T. R. 388; and see cases noted in *Clarke v. Gray*, 6 East, 564.

(n) 1 V. Wms. Saund. 58 A, n.; see forms, Tidd's Forms, 6th ed. p. 534, and references in Appendix, *post*.

(o) *Harrap v. Armitage*, 12 Pri. 441; *Savill v. Jackson*, 13 Pri. 715; 2 V. Wms. Saund. 187 e, n. (g); and see *Phillipson v. Earl of Egremont*, 6 Q. B. 604, in which it was held where the matter of a plea might have been pleaded to the action itself, it cannot be pleaded to a *scire facias* on the

judgment; and see *Bradley v. Eyre*, 11 M. & W. 451. "The rule of law is well settled, that you cannot plead to a *scire facias* any matter which might have been set up as a defence to the original action."

(p) 2 Tidd, 1159, 8th ed.; *Swan's case*, *Cro. Eliz.* 3.

(q) *Roles v. Rosewell*, 5 T. R. 538; see *ante*, p. 37, 38, n. (e); *Hankin v. Broomhead*, 3 B. & P. 607; see *Webb v. James*, 8 M. & W. 653, *per* Parke, B.

(r) 5 T. R. 637.

within its provisions, but that he *must assign* the breach of such covenants as he proceeds to recover the satisfaction for; and if the defendant plead to issue, and the cause goes to a jury for trial, the jury upon trial of such cause *must assess* damages for such of the breaches assigned as the plaintiff upon trial of the issues shall prove to have been broken."—And this decision has since been repeatedly affirmed (s). The statute therefore being compulsory, in all cases within its operation, on any further breach of covenant or agreement, or of payment of a money instalment, or of an annuity, after judgment, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it (t). The *scire facias* in such cases is not governed by the principle of law that beyond a year the judgment is presumed to be satisfied, and, therefore, a *scire facias* is required to revive it; but in all cases for demands accruing after judgment, on a bond, it issues whether within a year after the judgment or not, by virtue of the statute of Will. III.

In *Hurat and others v. Jennings* (u) a bond upon the face of it appeared to be conditioned for the payment of a sum certain; but by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees in the bond to commence an action, and to proceed to judgment whenever they should think fit, and upon judgment being obtained to issue execution; and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which then were or might thereafter become due to them. A judgment having been entered up by virtue of this deed the obligees issued execution without assigning breaches, or executing a writ of inquiry. It was held that this was a contrivance which, if allowed, would have the effect of defeating the statute of 8 & 9 Will. III. c. 11, which required that plaintiffs should suggest breaches in all actions upon bonds conditioned for the performance of covenants and agreements. This was a bond substantially conditioned for the performance of an

Scire facias
on judgment on further breach of condition of bond contained in another instrument.

(s) See *Waldecott v. Goulding*, 8 T. R. 127; *Willoughby v. Swinton*, 6 East, 550; In *Welch v. Ireland*, 6 East, 613, the Court said, "that it had been so often and so solemnly decided that the statute of King William was compulsory on the plaintiff to assign breaches, that it could not

be questioned, and they thought that construction right."

(t) *Willoughby v. Swinton*, 6 East, 550, over-ruling *Darby v. Wilkins*, 2 Stra. 937; *Marsden v. Touchet*, 2 Bla. R. 706; and see 2 V. Wms. Saund. 729, n. (c).

(u) 5 B. & C. 650.

agreement. "If that agreement had been incorporated in the condition of the bond, it was quite clear that the plaintiffs must have assigned breaches. And although parol evidence was not admissible to show that the condition of a bond was different from that which the words of it imported, yet as in this case the purposes of the bond were declared by an instrument of as high a nature, executed on the same day, this was a bond conditioned substantially for the performance of an agreement within the words of the act, and was clearly within the mischief intended to be remedied by the statute. One of the objects of the statute was to take away the necessity of proceedings in equity to obtain relief against an unreasonable demand of the whole penalty, where small damages only had accrued. If such a case as this had occurred before the statute the defendant would have been compelled to seek relief in equity (x).

For
breaches of
conditions
and agree-
ments in
same in-
strument.

We will now proceed to notice the applicability of the writ to the three descriptions of cases we have mentioned, namely, to recover damages for further breaches of covenants or agreements, after judgment on the bond; for further non-payments of an annuity after judgment on the bond securing payment thereof, and for non-payment of further instalments of money secured by bond, after judgment upon it.

Thus, on a bond conditioned not to assault a person, or not to do any other act, on judgment obtained for breach of the condition it would seem that a *scire facias* must issue on the judgment to recover damages for any further assault committed (y). So after judgment obtained for the non-performance of articles of agreement, performance of which is secured by bond, a *scire facias* must issue to recover damages for further breaches of the articles of agreement, even if the judgment be for the plaintiff on demurrer (z). So in an administration bond by a surety, conditioned duly to administer the goods and chattels of the deceased, damages for further breaches after the judgment must be recovered by *scire facias* (a).

The act extends also to an indemnity bond under which the party indemnified has been sued; in such a case the plaintiff must assign breaches not only for the costs recovered against him, but also for his own costs sustained in defending

(x) *Per* Littledale, J. in *Hurst v. East*, 1.

Jennings, 5 B. & C. 658; and see 10 Bing. 128-131, *Smith v. Bond*; and see *ante*, p. 34, n. (e).

(y) See *Jacobs v. Painter*, 13

(z) See Cowp. 357; *Gainsforth v. Griffiths*, 1 V. Wms. Saund. 58 i.

(a) See *Archbishop of Canterbury v. Robertson*, 1 C. & M. 181.

the suit, or he will be estopped by the statute from afterwards recovering that amount on the judgment by *scire facias* (b).

In any of the above cases on further breaches of any of the agreements or covenants entered into occurring *after* judgment, a *scire facias* would be required by the statute in order to recover further damages under the judgment already obtained.

A bond for the payment of an annuity was early decided to be within the provisions of the statute, as the action was for the penalty for the non-performance of "an agreement in writing" (c). And after judgment for breach of the condition, a set-off may be pleaded to a *scire facias* on the judgment alleging a further breach after judgment, covering the amount of the interest or annuity accruing due (d).

Scire facias
for further
breach, in
non-pay-
ment of
annuity.

In *Walcot v. Goulding* (e), which was an action of debt on a bond for 5000*l.*, conditioned to pay an annuity of 250*l.* to the plaintiff for his life, on judgment being obtained for breach of the condition, the plaintiff, without suggesting breaches on the roll, took out execution for 204*l.* 10*s.*; on which a rule was obtained to set aside the judgment. The Court held that it was established by the case of *Collins v. Collins* that a bond conditioned for the payment of an annuity was within the stat. 8 & 9 Will. III., and that it was decided in the cases of *Hardy v. Bern* (f), and *Roles v. Rosewell* (g), after great consideration, that in all cases within the stat. 8 & 9 Will. III. the plaintiff must assign breaches on the record, that statute being compulsory on him.

So if, on a bond for the payment of an annuity, a *fi. fa.* be sued out and marked only for part of the penalty (which the cases have since ruled must be assessed by a jury (f)), a new *fi. fa.* for subsequent arrears cannot be taken out without a *scire facias*, under the stat. of 8 & 9 Will. III. (h).

So, in *Murray v. The Earl of Stair* (i), Abbott, C. J., held that "bonds for the payment of annuities are clearly within

(b) *Harrup v. Armitage*, 12 Pri. 441. *Lee v. Lester*, 18 L. J., N. S., C. P. 312.

(c) *Collins v. Collins*, 2 Burr. 826. (e) 8 T. R. 126.
"The condition of the bond is an agreement in writing," *Id.*; and see Com. Dig. tit. Pleader 3, L, 1; and see the judgment in *Withers v. Harris*, 7 Mod. 67. (f) *Ante*, p. 38, and 5 T. R. 538.
(g) *Ante*, p. 40, and 5 T. R. 636.
(h) *Howell v. Hanforth*, 2 Bla. 843.
(i) 2 B. & C. 90.

(d) *Collins v. Collins*, 2 Burr. 820;

the provisions of the stat. of Will. III. that the judgment shall stand as a security for future payments (*k*).

Scire facias for further breach in non-payment of further instalments.

In the case of *Willoughby v. Swinton* (*l*), where judgment was signed in debt on a bond in a penal sum conditioned to pay off a large sum of money by instalments of 50*l.* a year, the plaintiff sued out a *scire facias* to recover a further instalment, after judgment. It was moved to set aside the *scire facias* on payment of the instalment and costs. But the Court held that "the case of *Collins v. Collins* (*m*) had entirely decided the present question; for when it was considered that in the case of an annuity, execution could not be sued out for arrears accruing subsequently to the judgment without a *scire facias*, as required by the stat. 8 & 9 Will. III. c. 11, s. 8, it decided the present question; for there can be no difference between a bond to secure an annuity for life, and a bond to secure a certain number of annual payments for so many years; the same reason must govern both cases."

So, in a bond in the penal sum of 10,000*l.* conditioned for the payment of 5250*l.* on the 29th of September, 1820, with interest in the mean time, payable half-yearly, an action having been brought for the penalty, upon a breach of the condition in non-payment of half a year's interest on the 29th September, 1817, the Court refused to stay the proceedings before judgment on payment of the interest due and costs, although the non-payment of the interest was owing to a slip; the Court holding that the plaintiff was entitled to proceed in his action to obtain judgment for the whole penalty, and that the judgment must stand as a security (*n*).

As to the assignment and suggestion of breaches, when to assign them, and when to suggest them on the roll.

Some difficulty and confusion have occurred with regard to the *assignment*, or *suggestion* of breaches, from a want of due attention to the difference between an *assignment* of breaches under the statute, and a *suggestion* of them.

The statute seems to have contemplated only two classes of cases; one, where the defendant pleads to issue, where the plaintiff must *assign* breaches; the other, where he does not plead to issue, as after judgment by default, demurrer, or *nil dicit*, in which case the plaintiff must *suggest* them. But the cases have put a different construction on the statute (*o*). The result of the decisions appears to be that the plaintiff may

(*k*) See *Smith v. Bond*, 10 Bing. 131.

(*l*) 6 East, 550.

(*m*) 2 Burr. 820.

(*n*) *Van Sandau v. —*, 1 B. & A. 214.

(*o*) *Webb v. James*, 8 M. & W. 656, *per Parke*, B.

if he please state the condition of the bond in his declaration, and *assign* as many breaches as he thinks fit. If the defendant plead, first, *non est factum*, and secondly, performance generally of the conditions, on issue joined, if the issues are found for the plaintiff the jury must also assess the damages on the breaches *assigned* (*p*). Or the plaintiff may declare on the bond generally. If the defendant plead *non est factum*, and then craveoyer of the condition of the bond and plead general performance, the plaintiff must show a breach in his replication, for he has not a cause of action unless he show one (*q*), and under the stat. of Will. III. he may *assign* as many breaches as he may think fit (*r*). If the plaintiff declare generally on the bond, and the defendant suffer judgment by confession, or *nil dicit*, or the plaintiff have judgment on a demurrer, either to his declaration, or to any plea thereto, the plaintiff must enter a *suggestion* upon the roll, upon which a *special venire* (*p*) must issue to the sheriff of the county where the action is brought, to assess the damages on the breaches *suggested*. If the defendant after cravingoyer of the condition plead any plea on which the plaintiff might at common law have taken an issue in his replication without assigning a breach of the condition of the bond, as if he plead a special matter that admits and excuses a non-performance (*s*), the plaintiff must traverse the special matter *only* in his replication, and on issue joined enter a distinct and separate *suggestion* of breaches under the statute (*t*), and not assign them in his replication as well as traverse the matter of excuse, for in that case the replication would be demurrable and bad for duplicity (*u*). Where the plaintiff declares generally, and the defendant cravesoyer of the condition and sets it out, and then pleads performance *as to part of the condition only*, and a matter which *admits and excuses* a non-performance *as to the residue*, then, as to the part of the condition as to which performance is pleaded, the plaintiff *must* (*v*) *assign* one or more breaches in his replica-

When may
assign.

When may
suggest.

(*p*) *Quin v. King*, 1 M. & W. 46.

(*q*) *Meredith v. Alleyn*, 1 Salk. 138.

(*r*) See *Plomer v. Ross*, 5 Taunt. 386. In this case the issue tendered was bad at common law (1 V. Wms. Saund. 187 b, n. (*f*); *Hornfray v. Rigby*, 5 M. & S. 60.

(*s*) *Meredith v. Alleyn*, 1 Salk. 138, *per* Holt, C. J.; and see Stephen on Pleading, 4th ed. 256.

(*t*) *Ethersey v. Jackson*, 5 M. & S. 60.

(*u*) *De la Rue v. Stewart*, 2 N. R. 362; *Webb v. James*, 8 M. & W. 645; 2 V. Wms. Saund. 187 c, n. "He cannot incorporate such issue and such suggestion in one and the same replication."

(*v*) *Meredith v. Alleyn*, 1 Salk. 138, and see *ante*.

tion, but as to the part of which performance is not pleaded but is excused there must be a *suggestion* on the roll; "or, if the matter of excuse is traversed, then there must be no *assignment*, but a *suggestion* of breaches, the truth of which, without any issue, must be tried with a view to ascertain the amount of damages, if the issue on the traverse is found for the plaintiff, otherwise not" (x). The statute does not authorize any other double pleading in a replication than the multiplication of such breaches as might be properly assigned at common law (y).

On any further breach of covenants or agreements, or non-payment of further instalments, or of an annuity, after judgment entered up, as seen by the section of the act (x), the plaintiff may have a *scire facias assigning* or *suggesting* such further breaches or non-payments, and calling on the defendant to show cause why execution should not be had for the same on the judgment, "upon which there shall be the like proceedings as were in the action of debt upon the bond, for assessing of damages upon the trial of issues joined upon such breaches, or upon inquiry thereof upon a writ to be awarded in manner as aforesaid." The rules and decisions therefore relative to assigning or suggesting breaches, in the original action, as above referred to, will be applicable to the proceedings on *scire facias* (a). In practice, however, it is usual, after reciting the judgment recovered and the prior breaches, to allege or *assign* the *further* breach in the declaration.

Costs.

The plaintiff is entitled to costs on the *scire facias* by the 3 & 4 Will. IV. c. 42, s. 34 (b). And this was the case even before this statute under the decisions on the stat. of 8 & 9 Will. III. (c).

(x) *Per Parke, B.*, in *Webb v. James*, 8 M. & W. 658; and see 2 V. Wms. Saund. 187 c.

(y) *Webb v. James*, *ubi supra*.

(z) *Ante*, p. 32, n. (b).

(a) For references to the forms see Appendix, *post*.

(b) The following is the section, "That in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment

after plea pleaded, or demurrer joined; and that where judgment shall be given either for or against a plaintiff or defendant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

(c) *Brook v. Booth*, 11 East, 387; 1 V. Wms. Saund. 58 h.

CHAPTER IV.

TO LEVY RESIDUE OF DEBT AFTER EVICTION FROM
POSSESSION UNDER AN ELEGIT.*When necessary*, p. 47.*Remedy for Debts at Common Law*, p. 47.*Of the Writ of Elegit*, p. 48.*Common-law Rule in Debt to the King*, p. 51.*Why called an Elegit*, p. 51.*Was formerly a full Satisfaction of the Debt*, p. 52.*Though the Debt were unsatisfied by the Plaintiff's Eviction from**the Lands*, p. 52.*The Remedy given by Stat. 32 Hen. VIII. c. 5*, p. 53.*If Part of the Lands taken in Execution remain in Plaintiff's Hands, the Statute does not apply*, p. 55.*If no Lands are extended the Elegit is in the nature of a Fi. Fa.* p. 55.*Form of Writ*, p. 57.

A WRIT of *scire facias* is necessary to enable a plaintiff who has already levied a part of his judgment debt, or debt of record, by means of a writ of *elegit*, to levy the residue of his debt, when from some cause or other he becomes dispossessed of the lands extended, and cannot levy the residue of the debt under the *elegit*.

In order more perfectly to explain why a *scire facias* is required in such a case (adopting the recommendation of Lord Coke, to endeavour to discover "the reason of the law, which is the life of the law" (a), "*Fœlix qui potuit rerum cognoscere causas*"'), it becomes necessary briefly to describe the nature and effect of the writ of *elegit*.

At the common law there existed but two writs of execution for the subject on a recognizance, or judgment recovered for debt, or damages (b), either of which it was necessary to sue out

When necessary.

Remedy for debts at the common law.

(a) Co. Litt. 183. b.

(b) Unless the damages were given in an action of trespass *vi et armis*; for where the act was committed with force, the law allowed the defendant to be arrested on mesne process; and

it was a rule that wherever a *capias ad respondendum* lay in process, a *capias ad satisfaciendum* would lie after judgment, 2 V. Wms. Saund. 68; and see *Sir William Herbert's case*, 3 Co. Rep. fol. 11.

within a year after the recognizance or judgment; one a writ of *levari facias*, by which the sheriff might levy the corn, and other *present* profit which grew upon the land, and the rents payable by the tenants, and the beasts levant and couchant upon the land, the land in all such cases being considered as the debtor (c); and the other a writ of *feri facias*, by which the sheriff was to seize the conusor's or the defendant's goods and chattels in execution (d).

Of the writ
of *elegit*.

The Statute of Westminster the Second (13 Edw. I.), c. 18, the same which gives the writ of *scire facias* in personal actions, first changed the old common-law rule, and gave to plaintiffs a writ of *elegit* under which the sheriff was to deliver to the plaintiff *possession of one half* of the defendant's land *until*

(c) *Davy v. Pepys*, Plowd. 441; *Breton v. Cole*, Skin. 619; 2 V. Wms. Saund. 68; 3 Bla. Com. 418.

(d) It is worthy of remark how modern enlightenment and civilization are, with respect to imprisonment for debt, slowly bringing back the statute law to the wise provisions of the old common law, under which all a man's goods and profits were liable to his creditors, but his person was free, and his possession of his land was protected, that he might earn further profits, for the benefit of his family, his creditors, and the country. When this sound principle shall be once again fully re-established, we shall look at the enactments on our statute book, for imprisoning men for debt, and caging them up from all possibility of effort to wipe out the debt or to support their families, and for making them a burden on the community, on whom their support is thus thrown, as barbarisms alike cruel and impolitic. It is worth while extracting Lord Coke's Commentary on the common-law rule. "At the common law, where a subject sued execution upon a judgment for debt or damages, he should not have the body of the defendant, or his land in execution (unless it were in special cases); and the reason of the law

was, that the body in case of debt, should not be detained in prison, but be at liberty, not onely to follow his owne affairs and businesse, but also to serve the King and his country when need should require; nor to take away the possession of his lands in that case, for that would hinder the following of his husbandry and tillage, which is so beneficiall to the common wealth, whereof you may reade at large in *Sir William Herbert's case*.

"But by the common law he should have execution in that case, onely of his goods and chattels, and of his corne and other present profit that grew upon his land, to which purpose the law gave him two severall writs, to be sued within the yeare, one a *levari facias*, whereby the sheriffe was commanded, *quod de terris et cattallis ipsius A. levari fac'*, and the other called a *fi. fa.*, which also was onely *de bonis et cattallis*."

In *Sir William Herbert's case*, 3 Co. Rep. fol. 11, it was, after argument "resolved at the common law (except in special cases), neither land nor body was liable to execution in debt, or damages recovered; but execution was to be done by *feri facias*, or *levari facias* of his goods and chattels, and profits growing upon his land."

the debt should be levied, "upon a reasonable price or extent" (e).

The 10th sect. of the Statute of Frauds (29 Car. II. c. 3) rendered liable "all such lands, tenements, rectories, tithes, rents and hereditaments" of a debtor, "as any other person or persons be in any manner or wise seised or possessed in trust for him" to execution by *elegit*, upon any judgment, statute, or recognizance thereafter to be obtained or made (f).

And, by the 1 & 2 Vict. c. 110, s. 11, the application of the

(e) That is, according to the reasonable yearly value of the land. The word "price" is referable to the defendant's goods and chattels, and "extent" to the defendant's land; *Palmer's case*, 4 Rep. 74 b; 2 V. Wms. Saund. 68 g, n.

The following is the section of the Statute of West. 2, (13 Edw. I. c. 18,) which gives the writ of *elegit*: "When debt is recovered or known in the King's Court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fi. fa.* unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of novel disseisin, and after by a writ of re-disseisin, if need be." (The writs of novel disseisin and re-disseisin are now abolished.)

(f) The following is the section: "And be it further enacted, that it shall and may be lawful for every sheriff or other officer, to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tene-

ments, rectories, tithes, rents, and hereditaments, as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of, in trust for him at the time of the said execution sued; which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons, as shall be seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* hereafter shall die, leaving a trust in fee simple to descend to his heir, then, and in every such case, such trust shall be deemed and taken, and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligations of his ancestors, for and by reason of such assets, as fully and amply as he might or ought to have been if the estate in law had descended to him in possession in like manner as the trust descended; any law, custom or usage to the contrary in any wise notwithstanding."

writ of *elegit* was made to extend to "all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him shall have been seised or possessed of at the time of entering up such judgment, or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff, or other officer, may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out" (g). The writ therefore is

(g) See the forms of the writ of *elegit*, as altered by the stat. of Victoria; 9 Ad. & E. 986; 4 M. & W. 546.

The following is the 11th section of the 1 & 2 Vict. c. 110, enlarging the operation of the writ of *elegit* :—

"And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore further enacted, That it shall be lawful for the sheriff or other officer, to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which at the time appointed for the commencement of this Act shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's superior Courts at Westminster, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised

or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the Court out of which such execution shall have been sued out, as a tenant by *elegit* is now subject to in a Court of equity: Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable, and is hereby required to make, perform, and render to the lord of the manor or other person entitled, all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform, and render, in case such execution had not issued; and

now extended in its operation to *all lands*, tenements, and hereditaments of which a debtor is seised or possessed, or of which he is *certain que trust*.

In the case of a debt to the king however, as appears by *Magna Charta*, c. 8, it was allowed by the common law for him to take possession of the lands of his debtor till the debt was paid. For he, being the grand superior and ultimate proprietor of all landed estates, might seize the lands into his own hands if anything was owing from the vassal, and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command (*h*).

This writ is called an *elegit*, because the plaintiff or conusee has made *his election* to sue out execution of the land itself; and it is given by this statute, instead of the common-law writs of execution of *levari facias*, or *feri facias*, of the growing crops, or of the goods and chattels; the entry, when the proceedings were in Latin, being, that the plaintiff "*elegit sibi liberari*," &c. "*omnia catalla debitoris (exceptis bobus et averiis carucæ) et medietatem terræ*" (*i*). Under this writ of execution the defendant's goods and chattels are not sold, but only appraised by a jury; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff at such reasonable appraisement and price in part satisfaction of his debt (*k*); the land being extended at a "*reasonable extent*" for the residue (*l*). This reasonable price and value is ascertained by the sheriff under the writ, on inquisition taken before a jury (*m*).

that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such writ of *elegit* shall have no greater or other effect than a writ of *elegit* would have had in case this Act had not passed."

(*h*) 3 Bla. Com. 419; and see 2 Bla. Com. 105, as to the allodial

right of the King in the soil, which no subject has, "all the lands in England being holden mediately or immediately of the King. The King therefore only hath *absolutum et directum dominium*," i. e. the *allodium*; "all subjects' lands being in the nature of *feodum*, or fee."

(*i*) Co. Litt. 289. b. And see 2 Inst. 394. "When the plaintiff or conusee prayeth an *elegit*, the entry is, *quod elegit sibi executionem fieri de omnibus catallis et medietate terræ*." 2 V. Wms. Saund. 68 c. n.

(*k*) 3 Bla. Com. 418.

(*l*) See note (*e*), *ante*, p. 49.

(*m*) *Palmer v. Knowlles*, 1 Leon. 176.

Common-law rule in debt to the king.

Why called an *elegit*.

Was formerly a full satisfaction of the debt.

Formerly, when an *elegit* had been sued out and was extended upon the land of the defendant and returned and filed of record, it was considered in law as a full satisfaction and end of the suit, and a *ca. sa.* against the person of the debtor, or a *fi. fa.* against his goods and chattels, could not afterwards be sued out on the same judgment, the whole debt being considered satisfied under the *elegit*; for the creditor was "to hold the land until he be fully satisfied" (m). The reason of this is explained in *Crawley v. Lidgeat* (m): "the taking of the land in extent for the debt being in judgment of law as if the plaintiff had taken a lease for years in satisfaction of the debt; that is, he elects to hold the land for so many years, till the debt be satisfied out of the rents and profits of it; and therefore he is not entitled to any other means of satisfaction by *ca. sa.* or *fi. fa.* (n).

Though the debts were unsatisfied by plaintiff's eviction from the lands.

Now, although the tenant by *elegit*, if "put out of the tenement," could then "recover by a writ of *novel disseisin*, and afterwards by a writ of *re-disseisin* if need be (o), he could only do this if he were unlawfully evicted by one without any or with inferior title; but if the tenant by *elegit* were divested of the lands he held in execution by one having a title paramount to his own, that is, a better title than the debtor from whom he extended the lands, (as and in the nature of a "lease for years" till his debt was satisfied (p)), it is clear that he could not recover

(m) *Crawley v. Lidgeat*, Cro. Jac. 339. See *Fenny v. Durant*, 1 B. & Al. 40; *Morris v. Jones*, 2 B. & C. 242.

(n) 2 Arch. New Prac. 99; 1 Chitty's Arch. 8th ed. 604.

(o) These writs were abolished by 3 & 4 Will. IV. c. 27, s. 33.

(p) *Crawley v. Lidgeat*, Cro. Jac. p. 339; and see the law, as to writs of *elegit* generally, 2 V. Wms. Saund. 68 a, n.; and see *Knowles v. Palmer*, Cro. Eliz. 160; Bac. Abr. tit. Execution, D; Co. Inst. 395; Co. Litt. 289. b.; 2 Tidd, 8th ed. 1077—1137. If lands, however trifling the value, be extended under an *elegit*, the party cannot afterwards sue out a *fi. fa.* or *ca. sa.* on the same judgment; but he may sue out other writs of *elegit* directed to the

sheriffs of other counties; 2 Arch. New Prac. 99; Chitty's Arch. Prac. 8th ed. 606; and see *Foster v. Jackson*, Hob. 59. "An *elegit* in divers counties one after another the plaintiff may have as the books are; H. 7, 19; 4 E. 5; Philip & Mary; Dyer, 162." Co. Litt. 290. a.—"Where a party takes an *elegit* and can have no fruit of it, he may resort to another execution, though the election be entered of record." "Upon the *elegit*, if there be no execution but upon goods, because there is no land, and the goods appear; I am of opinion the plaintiff may have a *capias*, for now it is in effect but a *fi. fa.*, though the word be *elegit*. But if there be land extended it is otherwise." Hob. 59.

possession of such lands against the right owner having a better title than his own, and that he would thus be entirely deprived of the fruits of his judgment ; because the rule of law remained unchanged and unaffected by this circumstance, and the creditor having *elected* to take his debtor's land in *satisfaction* of the debt until he was fully satisfied, if, when he was evicted lawfully by one having better title to the land, his debt was not fully satisfied, he could not afterwards resort to any other writ, or have any other remedy for the *residue of his debt*, the judgment roll showing that it was satisfied by the *elegit*.

To remedy this manifest deficiency of justice, the stat. 32 Hen. VIII. c. 5, was passed (g) : which, after reciting that
The remedy given by stat. 32 Hen. VIII. c. 5.
 "Whereas before this time divers and sundry persons have sued executions, as well upon judgments for them given of their debts and damages as upon such statutes merchant, statutes of the staple or recognizances, as have been to them before made, recognized, and knowledged ; and thereupon such lands, tenements and other hereditaments as were liable to the same execution have been by reasonable extent to them delivered in execution for the satisfaction of their said debts and damages, according to the laws of this realm ; nevertheless it hath been oftentimes seen that such lands, tenements, and hereditaments, so delivered and had in execution, have been recovered, or lawfully divested, taken away, or evicted from the possession of the said recoverors, obligees, or recognisees, their executors or assigns, before such time as they have been fully satisfied and paid off their said debts and damages, without any manner of fraud, deceit, covin, collusion, or other default in the said recoverors, obligees or recognisees, their executors or assigns, by reason whereof the said recoverors, obligees and recognisees have been thereby set clearly without remedy, by any manner suit of the law to recover or come by any such part or parcel of their said debts, and damages as was behind, and not by them levied or received, before such time as the said lands, tenements and other hereditaments, so by them had in execution were recovered, lawfully divested, taken or evicted out of and from their possessions, as is aforesaid, to their great hurt and loss, and much seeming to be against equal justice and good conscience"—proceeds to enact :—"For reformation whereof, be it enacted, That if hereafter any such lands, tenements, or hereditaments, as be, or shall be had and delivered to any person or persons in

execution, as is aforesaid, upon any just and lawful title, matter, condition or cause, wherewithal the said lands, tenements, and hereditaments were liable, tied and bound at such time as they were delivered and taken into execution, shall happen to be recovered, lawfully divested, taken or evicted out of and from the possession of any such person and persons, as now have and hold, or hereafter shall have and hold the same in execution as is aforesaid, without any fraud, deceit, covin, collusion, or other default of the said tenant or tenants by execution, before such time as the said tenants by execution, their executors or assigns, shall have fully and wholly levied or received the said whole debt and damages, for the which the said lands, tenements and other hereditaments were delivered and taken in execution as is aforesaid; then every such recoveror, obligee, and recognissee shall have and may have and pursue a writ of *scire facias*, out of the same court from whence the said former writ of execution did proceed, against such person or persons as the said writ of execution was first pursued, their heirs, executors, or assigns, of such lands, tenements, and hereditaments as were or been then liable or charged to the said execution, returnable into the same court at a certain day, being full forty days after the date of the same writ; at which day, if the defendant, being lawfully warned, make default, or appear and do not show and plead a sufficient matter or cause (other than the acceptance of the said lands, tenements, and hereditaments, by the said former writ of execution) to bar, avoid, or discharge the said suit for *the residue of the said debt and damages* remaining unlevied or unreceived by the said former execution, then the Lord Chancellor, or other such justice or justices before whom such writ of *scire facias* shall be returnable, shall make eftsoons a new writ or writs out of the said former record of judgment, statute merchant, statute staple or recognizances of like nature and effect as the said former writ of execution was, for the levying of the residue of all such debt and damage as then shall appear to be unlevied, unsatisfied or unpaid, of the whole sum or sums in the said former writ of execution contained, any law, custom, or other thing to the contrary hereof heretofore used in any wise notwithstanding" (r).

This provision is re-enacted, in similar terms, by the 8th Geo. I. c. 25, s. 4, which provides that, "if it should happen

(r) See 2 Co. Inst. 677; Bac. tleton, 289. b., speaks of this enactment as "a profitable statute passed since Littleton wrote."

that any lands, tenements, or hereditaments should thereafter be evicted from any person who should have extended the same," before sufficient had been extended and levied by virtue of any writ of extent, that then and in every such case, "the Court of Chancery shall and may award one or more re-extent or re-extends for the satisfying the same."

Under the provisions of these statutes, therefore, the tenant by *elegit*, if lawfully evicted before his debt is satisfied, has now his remedy over by writ of *scire facias*, to which writ of execution, if the defendant cannot plead a good bar, "other than the acceptance of the said lands, tenements or hereditaments, by the said former writ of execution," the plaintiff shall have a "writ of like nature and effect as the said former writ of execution was;" that is, by another *elegit*, or writ of execution of "like nature and effect," on which it would seem that the plaintiff or conusee has the same privileges as on the issuing of the original *elegit*; that is, if the sheriff return *nihil* to the writ (*s*), and the plaintiff "can have no fruit of it," the plaintiff or conusee may at his election sue out a *fi. fa.* against the debtor's goods and chattels, or a *capias ad satisfaciendum* (*t*) to take his person in satisfaction of the debt.

But if part only, and not the whole, of the land be evicted; indeed, if all but one acre be evicted, or the whole for a time only, as by a prior judgment, the plaintiff or conusee cannot have a re-extent under these statutes, but must hold the residue till he be satisfied (*u*).

If part of the lands taken in execution, remain in plaintiff's hands, the statute does not apply.

If the chattels of the debtor are sufficient to satisfy the debt, the sheriff ought not to extend the land for the residue under this writ, as by the Statute of Westminster the Second, which gives the *elegit*, the lands are only to be extended "if the goods are not sufficient" (*x*).

If no lands be extended under an *elegit*, but part of the debt is levied on the debtor's goods and chattels under it, "the *elegit* is but in the nature of a common *fi. fa.* upon which if part be levied the plaintiff may afterwards have a *ca. sa.*; the election

If no lands extended, the *elegit* is in nature of a *fi. fa.*

(*s*) *Knowles v. Palmer*, Cro. Eliz. 160.

(*t*) *Foster v. Jackson*, Hob. 57, 58; *Glascock v. Morgan*, 1 Lev. 92; *Cooper v. Langworth*, Moor, 545, pl. 724; 3 Bla. Com. 419; *Lancaster v. Fielder*, 2 Ld. Raym. 1457; *Pullen v. Purbeck*, 12 Mod. 357.

(*u*) Bac. Abr. tit. *Scire Facias*, C, 135; *Fukwood's case*, 4 Co. Rep. 66 a; Co. Litt. 289. b.; *Crawley v. Lidgeat*, Cro. Jac. 338; 2 V. Wms. Saund, 68 e, n.

(*x*) 3 Bla. Com. p. 418; 2 Co. Inst. 395.

is not complete unless the plaintiff has some benefit from the land, for the taking out the writ is not an actual election, but only in order to an election; and if there be no lands there is nothing to choose, and, consequently, no election" (y).

The object of the statute was strictly equitable; for, while on the one hand it gave a judgment creditor additional means of obtaining satisfaction of his debt if he were ousted of his possession of lands which he had extended, yet it did not give him the right to further writs of execution, without giving the judgment debtor an opportunity of pleading in bar of the further execution if he had any sufficient answer; which could not be done to a mere writ of execution (s). The statute therefore rendered a *scire facias* necessary, in which the judgment creditor must not only set forth all the proceedings that have been taken, but must show how much has been levied in execution, and the judgment debtor has then opportunity to question that amount, and show if he can that the whole debt has been levied, in bar of further execution, or that the judgment creditor has extended a portion of his lands from which his creditor is not evicted, and from which his creditor has a remedy *in futuro* (a).

The Courts also early decided that the equivalent remedy would lie, and that the judgment creditor might if he thought fit, in lieu of a *scire facias*, bring his action of debt on the judgment for the residue of the debt unlevied, to which of course the judgment debtor would have the same opportunity of pleading any answer he might have (b).

The succeeding statutes and modern decisions have not changed the principle thus laid down in the Statute of Westminster; and, if a debtor's lands be extended and the creditor be evicted before he have obtained satisfaction of his debt, he cannot issue further writs of execution without a *scire facias*, though he may bring his action of debt on the unsatisfied judgment (c).

(y) *Beacon v. Peck*, 1 Stra. 226; *Lancaster v. Fielder*, 2 Ld. Raym. 1451; *Knowles v. Palmer*, Cro. Elis. 160.

(z) "To a *fi. fa.*, or a *ca. sa.*, the defendant has no opportunity of pleading;" *Holmes v. Newlands*, 5 Q. B. 370, *per* Lord Denman.

(a) Bac. Abr. tit. Execution, B, 368.

(b) *Glascock v. Morgan*, 1 Lev. 92; *Hesse v. Stephenson*, 1 N. B. 133; *Green v. Elgie*, 1 Dowl. P. C. 344; *Holmes v. Newlands*, 5 Q. B. 370, *per* Lord Denman.

(c) *Holmes v. Newlands*, 5 Q. B. 367; *Clerk v. Withers*, 2 Ld. Raym. 1075; *Glascock v. Morgan*, 1 Lev. 92.

In the recent case of the *Mayor, Aldermen, and Burgesses of the Borough of Poole v. Whitt* (*d*), in which the plaintiffs sued on a covenant for rent, and the defendant pleaded that one Parr had recovered judgment against the plaintiffs on a bond, and sued out an *elegit* against their lands and evicted the defendant, the law relating to the writ of *elegit* was much discussed, and Platt, B., in giving judgment said, "Since 29 Car. II. c. 3, s. 10 (*e*), the writ of *elegit* reaches as well the equitable interests of the debtor, being *cestui que trust*, as by 18 Edw. I. c. 18 it did his freehold interests. Then the *only change* worked by 1 & 2 Vict. c. 110, s. 11, in cases not affected by the proviso at the end, (*f*) is that the subject-matter of the execution is altered to the whole instead of a moiety of the lands."

The rule laid down therefore in the statute, and in Coke's commentary upon it (*g*), and in the old cases, is unchanged; and, in the case referred to in the statute of Hen. VIII., a *scire facias* is the proper remedy to recover the residue of the debt, after a tenant by *elegit* has been evicted before he has obtained satisfaction of his debt.

As to the form of the writ, it must recite the judgment recovered, the election of the writ of *elegit* by the judgment creditor, and what was levied under it. It must then recite the lawful eviction of the judgment creditor from the possession of the lands so delivered in execution before the satisfaction of his debt, and conclude in the ordinary way with warning the defendant to show any cause he may have why execution for the residue of the debt should not issue against him (*h*).

(*d*) 15 M. & W. 571.

(*g*) Co. Litt. 289. b. See *ante*,

(*e*) See the *sect. ante*, p. 49, n. p. 54, n. (*r*).

(*f*).

(*h*) See *post*, Appendix, references

(*f*) See *sect. ante*, p. 50, n. (*g*). to forms.

Form of writ.

CHAPTER V.

SCIRE FACIAS AD REHABENDAM TERRAM.

When it lies, p. 58.

When not necessary, p. 59.

When necessary in case of an Elegit upon a Judgment, or Recognizance at Common Law, p. 59.

On Tender in Court of Residue of Debt, p. 60.

When Satisfaction of the Debt has arisen from accidental Profits, p. 60.

Does not lie upon a general Averment that the Debt has been levied, p. 60.

The Defendant may also have a Scire facias to account, p. 61.

Necessary in all Cases on an Extent

on a Statute Merchant, Statute Staple, or Recognizance in the Nature of a Statute Staple, p. 61.

It lies also for the Grantee of the Reversion of the Lands extended, p. 62.

Mode of accounting in Common-law Courts, p. 62.

Mode of accounting in Equity, p. 62.

Motion for Reference to Master to take an Account, p. 62.

Accounting since Stat. 1 & 2 Vict. c. 110, p. 62.

Interest allowed on Judgment, p. 63.

When it lies.

A *scire facias ad rehabendam terram* lies for avoiding executions by *elegit* upon judgments, recognizances, or statutes, which have been justly obtained at first, but which, having been satisfied, ought to cease (a). If execution on a judgment, recognizance, or statute have been unjustly obtained at first, the remedy for the defendant or conusor is by writ of *audita querela*, or by motion in court (b).

The writ of *scire facias ad rehabendam terram* lies for a defendant or conusor to recover back his land, extended by the plaintiff or conusee by writ of *elegit*, when the plaintiff has fully satisfied his debt by accidental profits which do not appear in the extent (c);

(a) 2 Rol. Abr. 880; Bac. Abr. tit. Scire Facias, 135; *Id.* tit. Execution, p. 374; 2 V. Wms. Saund. 72 ff, n. 6.

(b) Com. Dig. Audita Querela, A; Bac. Abr. Audita Querela, 424; *Turner v. Davies*, 2 V. Wms. Saund.

147, n. 1; *Snook v. Mattock*, 5 Ad. & El. 245; *Lester v. Mundell*, 1 B. & P. 428; *Mitford v. Cardwell*, 2 Stra. 1198.

(c) Bac. Abr. tit. Scire Facias, 136.

or if the judgment be on a statute merchant, or staple, if he have fully satisfied his debt, costs, and damages (*d*), out of the extended value of the land, and still retain possession of it.

We will take separately each case in which the writ is necessary.

It has been seen, by the last chapter, that when the plaintiff or conusor has elected to issue a writ of *elegit* to have execution on a judgment against his debtor's lands, they are to be delivered to him at "a reasonable price or extent;" that is, according to the reasonable yearly value of the land (*e*), "until the debt be levied" (*f*). And this has been construed to mean not simply until the debt is, but until it *may be* levied without his wilful default (*g*). When therefore the debt is certain, and it appears on the record as in a judgment or recognizance, and the yearly value of the land has been ascertained and settled in the extent, it is mere matter of computation when the debt shall have been satisfied; and in such a case, when the debt has been paid by the perception of the usual and ordinary profits of the land so settled, there is no act on record to oppose the debtor's re-entry on his lands. A *scire facias* is then not necessary, but the debtor may lawfully re-enter, or may bring his action of ejectment (*h*) against the tenant by *elegit*, if he continues to retain possession of the lands (*i*). When not necessary.

But if the defendant or conusor, in an *elegit* upon a judgment or recognizance at common law, bring the whole of the debt into Court, and tender it to the plaintiff or conusee, and he refuse to accept it, or if he have a release from the plaintiff or conusee, or have paid him the money and has his acquittance before the tenant by *elegit* can have been satisfied for the debt out of the extended value of the land, the defendant or conusor must have a *scire facias* to recover the lands within the time of the extent, and he cannot re-enter upon his lands, or proceed by ejectment against When necessary, in case of an *elegit* upon a judgment or recognizance at common law.

(*d*) 2 Inst. p. 680.

(*e*) See *ante*, ch. iv. p. 49, and n.

(*f*).

(*g*) See sect. of Stat. West. 2 (13 Edw. I.), c. 18; *ante*, p. 49.

(*h*) 2 V. Wms. Saund. 72 ff, n. 6; *Sir Andrew Corbett's case*, 4 Co. Rep. 81. "Otherwise he which is to levy the sum, by deferring to do it may exclude the reversioner for ever."

(*i*) 1 Chitty's Arch. Prac. 607, 8th ed.; Bac. Abr. tit. *Scire Facias*, 136;

2 V. Wms. Saund. 72 ff, n.; Bac. Abr. tit. Execution, 374.

(*i*) But it has been held, that if tenant by *elegit* or statute neglect to take the profits, the defendant or conusor, at the time when the debt might have been satisfied thereout, may sue out a *scire facias* to have his land again, though he cannot in such case enter, that is, bring an ejectment; *Sir Andrew Corbett's case*, 4 Co. Rep. 82 a; 2 V. Wms. Saund. 72 ff, n. 6.

the plaintiff or conusee; because the possession of the plaintiff or conusee being founded upon matter of record, is not to be taken away by entry before he has an opportunity of answering in a Court of record (j).

On tender in court of residue of debt.

So, "if the plaintiff or conusee has levied part of the debt according to the extent, the defendant or conusor, upon tender of the residue in Court, on its acceptance being refused by the plaintiff or conusee, shall have a *scire facias* to recover the lands within the time of the extent: for here it appears on record how much was due at first, how much was paid, and what remains due and in arrear; and the end of the extent being to satisfy the conusor of his just debt, whenever that appears to the Court the extent shall cease (k). But if the defendant or conusor had tendered the remainder of the debt out of Court, or if in Court he had only offered to come to an agreement with the plaintiff or conusee, in neither of these cases should the *scire facias* be granted, because it does not appear on record that the debt is paid" (l).

Where satisfaction of the debt has arisen from accidental profits.

So, where satisfaction of the debt has arisen from accidental profits (m), which do not appear in the valuation of the land settled by the extent on record, as where the plaintiff or conusee has levied part by cutting wood and has received the residue, as appears by an acquittance, the defendant or conusor shall have a *scire facias*; and "the reason is, because the end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the Court that they are answered, whether it be by perception of the profits or otherwise, they will grant a *scire facias* to avoid the extent, and reinstate the conusor in his former possession, since the end for which the extent was given is answered" (n).

Does not lie upon a general averment that the debt has been levied.

But no *scire facias* lies upon a general averment that the plaintiff or conusee has levied the debt before the time of the extent expired, because this may happen by the plaintiff's or conusee's industry in improving the land which the debtor can take no

(j) 2 Rol. Abr. 479, D, pl. 2; 2 V. Wms. Saund. 72 *gg*, and authorities there quoted; and see a precedent to have delivery of lands extended by *elegit* in debt; Rastell's Entries, 164, B.

(k) See precedent of *scire facias* to have delivery of lands extended by *elegit*, when plaintiff has levied part of the money, and the defendant is pre-

pared to pay part of the residue, and brings the money into Court, which plaintiff received; *Veteres Intrationes*, 138; *Moyle's Entries*, 101.

(l) Bac. Abr. tit. Execution, 375.

(m) Bac. Abr. *ubi supra*.

(n) 2 Rol. Abr. 482; Bac. Abr. tit. *Scire Facias*, 136; *Ibid.* tit. Execution, 375.

advantage of; or it may happen from the land having been extended below its annual value (which is always the case, the writ ordering the sheriff to deliver the lands upon "a reasonable" extent, which is entered on record), and the general averment would then be contrary to the record; and the Court is to judge of the value according to the extent, by which it appears the debt is not yet levied (o).

In these cases the defendant or conusor may, if he please, have a *scire facias* to account, as well as to have his land again (p). Defendant may also have a *scire facias* to account.

In all cases where land is extended on a statute merchant, statute staple, or recognizance in the nature of a statute staple, the defendant or conusor cannot enter, though the plaintiff or conusee has received the whole debt, damages, and costs, but must sue out a *scire facias ad computandam et rehabendam terram*; for, by the Acts of Parliament which give those securities (q), the conusee is entitled to retain the land until he is satisfied for his debt, costs, and damages, together with his reasonable labours and expenses (r); and, as those are uncertain, and the plaintiff or conusee is in by matter of record, the defendant or conusor must sue out a *scire facias* against the plaintiff or conusee before he can have his land restored (s). Necessary in all cases on an extent on a statute merchant, statute staple, or recognizance in the nature of a statute staple.

And, as in the case of a tenant by *elegit*, if the tenant by statute have levied part of the debt under the extent, the conusor or defendant, upon tender of the residue in Court, shall have a *scire facias ad rehabendam terram*; but, if the conusor or defendant tenders the money, but not in Court, and the tenant either by *elegit* or statute refuse to receive it, or if he had only offered to come to an agreement with the plaintiff or conusee, the defendant or

(o) Bac. Abr. tit. Execution, 375; 2 V. Wms. Saund. 72 *gg*.

(p) Bro. Scire Facias, 32; 2 Inst. 396; 2 Rol. Abr. 479, D, pl. 2, 481; pl. 6, 483, K; pl. 11, 14; Hard. 82; Bro. Scire Facias, 92; 2 Vent. 338; *Marsh v. Lee*, 2 Rol. Abr. 486, P, pl. 2; Dalt. Sher. 136; 2 V. Wms. Saund. 72 *gg*.

(q) The Stat. de Mercatoribus (13 Edw. I. stat. 3, c. 1); 27 Edw. III. stat. 2, c. 9; 23 Hen. VIII. c. 6; see *post*, book iii. ch. iii. as to these statutes.

(r) *Fukwood's case*, 4 Co. Rep. 64; 2 Inst. 680. See form of precedent in *scire facias* against tenant by *elegit*, to

account; Browne's Methodus Novissima, 371.

(s) V. Wms. Saund. 72 *gg*; Bac. Abr. tit. Scire Facias, 136. "Because the damages are not ascertained, the record will always oppose an entry, which is but an act *in pais*, and cannot be turned into a defeasance of a matter of record till such damages are settled on record in the *scire facias*." 2 Rol. Abr. 480, 497; Bro. Scire Facias, 87; 2 Inst. 396, 680; Bac. Abr. tit. Scire Facias, 136; *Id.* tit. Execution, 374; *Fukwood's case*, 4 Co. Rep. 64; Dalt. Sher. 136; Hard. 82; *Burwell v. Harwell*, Cro. Car. 598; *Dighton v. Greenville*, 2 Vent. 336.

conusor shall not have a *scire facias* (t), because it does not appear on record that the debt is paid (u). In Rastell's Entries (x) a profert of the money into Court is stated after the sheriff's return to the *scire facias*.

It lies also for the grantee of the reversion of the lands extended.

Mode of accounting in common-law courts.

The grantee of a reversion may also bring a *scire facias* against him who hath execution of the lands on a statute merchant, on alleging that he hath satisfaction by some casual profits, even though he was not party or privy (y).

The Court, in the case of a *scire facias*, for an account and to have the land back again, takes the account according to the extended value, which the sheriff always fixes much below the real value (z).

Mode of accounting in equity.

The conusor or defendant may also proceed by bill in equity for an account, in which case the plaintiff or conusee must account for the profits he has received above the extended value (a); but that is only done upon the terms of the defendant or conusor paying interest on the judgment, and such extra costs and damages as the plaintiff was necessarily put to by the defendant (b).

Motion for reference to Master to take an account.

Or the conusor or defendant may apply to the Court of common law out of which the *elegit* issued, for a rule calling upon the plaintiff or conusee to show cause why it should not be referred to the Master, to take an account of the rents and profits received by the plaintiff out of the defendant's estate of which the plaintiff is tenant by *elegit*, and why the plaintiff should not give up possession to the defendant if it should be found that all the moneys due to him had been received (c).

Accounting since stat. 1 & 2 Vict. c. 110.

And now, by the stat. 1 & 2 Vict. c. 110, s. 11 (d), the *elegit* creditor is to hold the lands extended "subject to such account in the Court out of which such execution shall have been sued out,

(t) 2 V. Wms. Saund. 72 ff, n. 5; 2 Rol. Abr. 482.

(u) Bac. Abr. tit. Scire Facias, C, 2, 137.

(x) Rast. 236 a; 2 V. Wms. Saund. 72 ff, n. 5.

(y) Bac. Abr. tit. Scire Facias, 137; Dyer, 1 b, pl. 6. As to privies, see Co. Litt. 352. b.; *Outram v. Morewood*, 3 East, Rep. 346, in which the question is much discussed; and see notes to *Duchess of Kingston's case*, in 2 Smith's Leading Cases, p. 442, in which the cases are collected.

(z) 2 V. Wms. Saund. 72 gg.

(a) *Ib.*, and see 1 Chitty's Arch. Prac. 607, 8th ed.

(b) *Marsh v. Lee*, 2 Vent. 338; *Earl of Bath v. Earl of Bradford*, 2 Ves. 589, 590; Hard. 136; *Lewes v. Morgan*, 3 Y. & Jer. 394, 395; *Godfrey v. Watson*, 3 Atk. 517.

(c) *Price v. Varney*, 3 B. & C. 733; S. C., 5 D. & R. 612; 2 V. Wms. Saund. 72 gg, n. (s); 1 Chitty's Arch. Prac. 607, 8th ed.

(d) See *ante*, ch. iv. p. 50, n. (g).

as a tenant by *elegit* is now subject to in a Court of equity." Since this statute, therefore, the old practice appears to be superseded, and the most advisable course would seem to be by motion in the Court out of which the *elegit* issued, for a rule to show cause why there should not be a reference to the Master to take an account, and to order possession to be delivered up to the defendant, if it appeared that the debt, &c., was satisfied, as in the case of *Price v. Varney* (e).

By the 17th sect. of 1 & 2 Vict. c. 110, it is enacted, "that ^{Interest allowed on} every judgment debt shall carry interest at the rate of 4l. *per cent.* judgment. *per annum* from the time of entering up the judgment (or from the time of the commencement of this Act, 1st October, 1838, in cases of judgments then entered up and not carrying interest,) until the same shall be satisfied, and such interest *may be levied under a writ of execution on such judgment.*" The plaintiff or conusee will therefore be entitled to recover interest on his judgment debt, as well as the debt, &c., in an account, from the date of the entering up of the judgment or the commencement of this Act of Parliament, as the case may be (f).

(e) *Ubi supra.*

of scire facias ad rehabendam terram,

(f) For reference to forms of writs

see Appendix, *post*.

CHAPTER VI.

SCIRE FACIAS QUARE RESTITUTIONEM NON ON A
JUDGMENT REVERSED.

When the Writ is required, p. 64.
In what Cases it is not necessary,
p. 64.

The Reason why it is necessary to
issue the Writ, p. 65.

The Writ also necessary when
there has been a Change of Par-
ties, and a Judgment has been
reversed in Error, p. 65.
The Forms, p. 65.

When the
writ is re-
quired.

A *scire facias quare restitutionem non* is required when a judgment in a Court below has been reversed in one of the superior Courts (a), or where restitution has been awarded on a writ of error into the Exchequer Chamber (b), and on the judgment in the Court below execution has been issued, and the debt or damages have been levied, but not paid over (c). In such a case, there must be a *scire facias* suggesting the matter of fact, viz., the sum levied, &c. (d)

In what
cases it is
not neces-
sary.

In a writ of error, if judgment be reversed, the plaintiff or defendant (as the case may be) is to be restored to all that he has lost, and to what by colour of the judgment in the Court below had been taken after judgment, and a writ of restitution shall be awarded (e). Where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed; there, because it appears on the record that the money is paid, and there is a certainty of what was lost (f), the party shall have restitution without a *scire facias*. Neither is a *scire facias* for restitution necessary where judgment has been set aside after execution, for irregularity; but an attachment shall be granted upon the rule for contempt, if there be not a restitution (g).

(a) See 2 Lilly's Mod. Entries, 641, 650, and precedents referred to in the Appendix.

(b) *Vesey v. Harris et Uxor*, Cro. Car. 328.

(c) *Anon.* 2 Salk. 588.

(d) *Ib. supra.*

(e) *Sympton v. Jaxon*, Cro. Jac. 699; 2 V. Wms. Saund. 101 *gg*; 2 Tidd's Prac. 1245, 8th ed.

(f) *Anon.* 2 Salk. 588; 2 V. Wms. Saund. 101 *gg*.

(g) *Per Holt*, C. J., 2 Salk. 588; 3 Tidd's Prac. 8th ed. 1073.

The reason, therefore, why a *scire facias* would seem to be required, is the want of certainty of the sum of which restitution has been awarded, where it has been levied but not paid over. This sum is suggested in the writ of *scire facias*, to the declaration on which the defendant has an opportunity of pleading any matter of defence or excuse or denial which he may have, and the facts on the issues joined are afterwards ascertained, as in any other action, or he suffers judgment by default; in either of which cases the sum levied is rendered certain and placed on the record, and execution can then issue on the judgment for its restitution.

In Chitty's Arch. Practice (h), it is stated that "the plaintiff in error may obtain redress by application to the Court or a judge, to have restored to him all that has been taken or levied from him under the judgment." No authority is given for this position, and it not only seems contrary to the principle laid down in the case in Salkeld, quoted in the text, but in a later case in the same reports, *Western v. Crewick* (i), there is a decision expressly the other way. In that case, judgment had been obtained against the defendant in an action of debt on a bond; and upon a *fi. fa.* directed to the sheriff, he took some of the defendant's goods and sold them; afterwards this judgment was reversed, and upon a motion to bring the money into court for which they were sold, or to pay it to the defendant himself, the Court would make no rule, for the goods might be sold for less than they were worth, and they held that on that account the defendant might bring an action of trespass if the plaintiff did not agree with him.

Wherever there has been a change of parties by death or otherwise, and a judgment has been reversed on error, a stranger to the record cannot have restitution without a *scire facias* (k). This case follows the general principle, (which will be found fully treated of in the next book, *post*.) that in all cases where there is a new party to the suit, a *scire facias* is necessary (l).

The forms of the writ will be found referred to in the Appendix, *post*.

(h) P. 511, 8th ed.

(i) 3 Salk. 214; 4 Mod. 161.

(k) *The King v. Lever*, 1 Show. Rep. 261.

(l) As to what shall be restored under a writ of restitution on the reversal of the first judgment, see 2

Tidd's Prac. 8th ed. 1246; Bac. Abr. tit. Error, M, 3; 1 Rol. Abr. 776. As to writ of restitution, see *Doe d. Stafford v. Shail*, 2 D. & L. 161; *Doe d. Stevens v. Lord*, 6 Dowl. 256; *Goodtitle d. Murrell v. Badtitle*, 9 Dowl. 1009.

The reason why it is necessary to issue the writ.

The writ also necessary when there has been a change of parties, and a judgment has been reversed in error.

CHAPTER VII.

EXCEPTIONS TO THE GENERAL RULES REQUIRING A
WRIT OF SCIRE FACIAS.

Scire Facias not necessary where Judgment has been suspended, by the Agreement of the Parties, till a Year and a Day after the Time agreed, p. 87.

Even if the Agreement be by Parol, p. 69.

Scire Facias not necessary where the Defendant brings a Writ of Error to revive the Judgment until after the Year from the Determination of the Writ of Error has expired, p. 70.

And if the Judgment have expired by Lapse of Time, the Writ of Error revives it, p. 70.

Scire Facias not necessary where the Defendant obtains a Stay of Execution by Injunction out of Chancery, p. 70.

Scire Facias not necessary to revive a Debt secured on a Statute Merchant, Statute Staple, or Recognizance in the nature of a Statute Staple, p. 71.

Nor in Case of a New Party affected by such a Security, p. 71. These Recognizances of a Private Kind, p. 71.

Nature of a Statute Merchant, p. 72.

Nature of a Statute Staple, p. 78.

Of a Recognizance in the nature of a Statute Staple, p. 81.

Reason of the Exemption of Debtors under these Securities from Scire Facias, p. 83.

Scire Facias not necessary where a Writ of Execution has been

taken out within the Year, p. 84. No Objection to a Scire Facias that it has been unnecessarily sued out, p. 87.

This Exemption applies only to the Lapse of Time, and not to Cases where there is a New Party to the Record, p. 87.

Scire Facias not necessary to revive a Judgment on a Warrant of Attorney given by an Insolvent Debtor under 1 & 2 Vict. c. 110, s. 87, p. 88.

Exemption confined to Cases where it would otherwise be required by Lapse of Time, p. 88.

Scire Facias not necessary to revive a Rule of Court in the nature of a Judgment under 1 & 2 Vict. c. 110, s. 18, on account of Lapse of Time, p. 89.

Scire Facias not necessary since the Statutes 7 & 8 Vict. cc. 110 and 113, in order to have Execution against a Member of a Joint-stock or Banking Company incorporated under either of those Acts, on a Judgment obtained against such Company or its Public Officer, p. 90.

Experiment to render liable to Execution the Lands of a Partner in a Banking Company framed under 7 Geo. IV. c. 46, without a Scire Facias, p. 92.

Scire Facias not necessary for the Crown to revive its Debts because of the Lapse of Time, p. 94.

Scire Facias not necessary for the Crown in the Case of the Death of its Debtor, to have Execution against his Heir, Executor, or Administrator, p. 94.

Scire Facias not necessary for the Crown on Debts of Record, where the Execution is a First

Proceeding, without any previous Judicial Inquiry, on an Affidavit that the Debt is in danger of being lost, p. 95.

Nor is it necessary before extending the Debt of the King's Debtor, on an Affidavit of Danger, p. 97.

IN the first and introductory chapter a brief outline has been given of those cases which form exceptions to the general rules, that execution cannot issue upon a judgment more than a year and a day old, nor where the execution is to be levied by or against a new party to the suit, unless it be revived by *scire facias* (a). In the present chapter we will proceed to examine those exceptions in their order more in detail.

A *scire facias* is not necessary to revive a judgment more than a year and a day old, where the execution of the judgment has been suspended; either, 1st, by the agreement of the parties, or, 2ndly, by operation of the law set on foot by the defendant—to reverse the judgment by writ of error, or to stay the execution by an injunction out of Chancery. The principle on which these exceptions are founded is the same in each case, and is well defined in the case of *Powis v. Powis* (b), where the Court observed, “that the reviving a judgment by *scire facias* was intended to prevent a surprise on the defendant” (c).

As to the first exception, where the execution of the judgment has been stayed by the agreement of the parties beyond a year and a day, there can be no “surprise” on the defendant, if after that period execution should be issued, for it was by his own agreement that till then it was delayed (d).

In such a case there needs no *scire facias* till a year and a day after the time agreed (e).

But if the plaintiff do not take out execution within a year after the *cesset executio* is determined, he must sue out a *scire facias* (f).

Scire facias not necessary where judgment has been suspended by the agreement of the parties, till a year and a day after the time agreed.

In *Morris v. Jones* (g), in which case a warrant of attorney con-

(a) See ch. i. p. 8.

409; and see 2 Tidd's Prac. 8th ed. 1155.

(b) 6 B. Moore, 517; and see note to *Hiscocks v. Kemp*, 3 Ad. & E. 683.

(c) Com. Dig. tit. Execution, I, 4.

(f) 2 Tidd's Prac. 8th ed. 1155; 2

(e) And see *Michel v. Cue et Usor*, 2 Burr. 660.

Crompt. 102.

(d) Bac. Abr. tit. Execution, H

(g) 3 Dowl. & Ry. 605; and 2 B. & C. 243.

tained a stipulation that execution might issue upon the judgment after a year and a day without revivor by *scire facias*, this question was mooted, and it was there held that the parties might lawfully make such a bargain, and that the execution was good, Lord Tenterden (A) saying, "If the defendant thought proper to enter into a bargain that execution should issue upon the judgment without a *scire facias* to revive it, he cannot afterwards be permitted to avoid the consequences by setting up the illegality of the proceeding" (i).

In the case of *Hiscocks and another v. Kemp* (k), which was argued in the Queen's Bench on a rule for setting aside the execution issued against the defendant, upon a judgment on a warrant of attorney, more than a year and a day after judgment, without reviving it by *scire facias*, the Court entered very fully into the question. In the defeasance of the warrant of attorney it was agreed that the plaintiffs "should be at liberty to enter up judgment thereon at their pleasure, and in default of payment to issue execution," &c. Lord Denman, in delivering the judgment of the Court, said, "For the plaintiffs it was contended that whenever the execution was suspended beyond the year and day after signing the judgment by the agreement of the parties, the delay so occasioned would not compel the plaintiff to revive the judgment, and that the facts of this case brought it within the exception to the general rule. The defendant denied that any such agreement appeared in the case; and further that if it did it could not waive a necessity imposed expressly by statute; the authorities on which such a practice was founded were asserted not to warrant it when duly examined, and in particular it was contended that the case of *Withers v. Harris* (l) was a decision directly in point, and the other way. We have looked into the facts and the authorities, and are of opinion that on neither ground is there any reason for disturbing the execution.

"With respect to the practice, it has long been clearly understood in the profession, that 'if the plaintiff has judgment with a *cesset executio* for a year, he may after the year take out his execution without a *scire facias*, because the delay is by consent of parties and in favour of the defendant.' This is the language of Mr. Serjeant Williams, in the notes on *Underhill v. Devereux* (m), and we should be very unwilling to disturb, except on the clearest grounds, a practice now well recognised, on which all persons

(A) As reported in 3 Dowl. & Ry.

(k) 3 Ad. & E. 676.

(i) And see *Sherran v. Marshall and another*, 1 D. & L. 689.

(l) 7 Mod. 64.

(m) 2 Wms. Saund. 72 e, n. (4).

have acted for a long series of years, and which is neither unreasonable nor inconvenient in itself."

After going through the authorities cited in argument on the subject, the Court, at the conclusion of the judgment, said, "We cite these as specimens of what may be found in the books on this subject; but we pronounce our judgment, that this execution ought not to be disturbed, on the principle that it has issued in accordance with the practice of the Courts, long considered as established, not inequitable or inconvenient in itself, nor at variance with any legal principle, statute, or decided authority."

Since this case, which is now the leading case on this point, and which Mr. Justice Coleridge, in *Morgan v. Burgess* (n), said was "a well considered judgment," a point was raised in the latter case that though *Hiscocks v. Kemp* decided that under such an agreement in a warrant of attorney it was not necessary to revive a judgment by *scire facias*, yet that such an agreement, if a parol agreement only, would not waive the benefit of the statute. But the Court held, that if the defendant has even by parol agreed to waive the necessity of a *scire facias*, notwithstanding the Statute of Westminster the Second (13 Edw. I. c. 45, s. 1), a writ of execution may be issued on the judgment, after the year and a day has expired without suing out a *scire facias* (o). Even if the agreement be by parol.

So, where a judge's order was obtained by consent to save expense, whereby it was ordered that execution should issue upon a judgment more than a year old, without a *scire facias*, the Court of Exchequer refused to set the execution aside, and held it to be valid even as against the assignees of the judgment debtor, against whom the execution issued (p). So, after a warrant of attorney has been executed, and judgment has been signed thereon, an agreement between the parties to waive the necessity of a *scire facias* to revive the judgment is a valid agreement (q).

(n) 1 Dowl. N. S. 852.

(o) And see a similar principle laid down in the case of *Bland v. Durlay*, 3 T. R. 530, where the plaintiff delayed signing judgment, on the defendant promising to pay him, till four terms had expired at the defendant's request, and it was held that a term's notice, that the plaintiff intended to proceed with his action after lying by four terms, was not in this case necessary, as the rule was established for the purpose of preventing any surprise on the defend-

ant, and it did not apply to a case where the defendant had been using false pretences to prevent the plaintiff obtaining judgment in the regular time; see 2 Chitty's Arch. 8th ed. 846, as to the practice.

(p) *Harmer v. Johnson*, 14 M. & W. 336; S. C., 3 D. & L. 38; and see *Cooper v. Norton and others*, 16 L. J., N. S., Q. B. 364.

(q) *Cooper and others v. Norton and others*, 16 L. J., N. S., Q. B. 364.

Secondly, a *scire facias* is not necessary to revive a judgment more than a year and a day old, where the execution has been suspended by the operation of the law, set on foot by the defendant.

Not necessary where defendant brings a writ of error to revive the judgment by *scire facias* after a year has expired, nor until after the year from the determination of the writ of error.

If the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuited, or the writ of error abated or discontinued, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*; because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait until it be determined. Besides, while the cause is depending on the writ of error, it is still *sub judice* whether the plaintiff below shall recover or not, and the year for the execution ought to be accounted from the final judgment given (r).

And if the judgment has expired by lapse of time the writ of error revives it.

So, if the year has expired before the writ of error is sued out, and the judgment is affirmed, or the plaintiff in error is nonsuited, or the writ of error is discontinued, the plaintiff may sue out execution without a *scire facias*; for by the writ of error the defendant has renewed the record (s), and revived the judgment (t).

Not necessary where defendant obtains a stay of execution by injunction out of Chancery.

For the same reason the same rule prevails where the defendant after judgment has obtained a stay of execution by an injunction out of Chancery (u). This was settled by the case of *Michel v. Cue et Uzor* (x), in which, on cause being shown against setting aside an execution for irregularity for having issued execution above a year and a day after judgment without any *scire facias* to revive it, it appeared that the whole delay had arisen from the defendant's having stayed the execution by injunctions out of Chancery, and the Court were unanimous that the rule requiring a *scire facias* to revive a judgment of above a year old before suing out execution upon it, which was intended to prevent a surprise upon the defendant, ought not to be taken advantage of by a

(r) Bac. Abr. tit. Execution, H, 408; 2 V. Wms. Saund. 72 d, note to *Underhill v. Devereux*; *Goodwin v. Grudge*, Cro. Eliz. 416; and see *Sir Henry Bellasis v. Hanford*, Cro. Jac. 364; 1 Rol. Abr. 899, n., pl. 9; *Howard v. Pitt*, Carth. 237; *Booth v. Booth*, 6 Mod. 288; *Withers v. Harris*, 7 Mod. 68; *Dennis v. Drake*, Lane, 20; 2 Inst. 471; Yelv. 7; Bac. Abr. tit. *Scire Facias*, n. (c) 1; Com. Dig. tit. Execution, I, 4.

(s) *Sir Henry Bellasis v. Hanford*,

Cro. Jac. 364; S. C., 1 Rol. Rep. 104.

(t) 2 V. Wms. Saund. 72 d, n.; 1 Rol. Abr. 899, n. pl. 3, 4, 5; Lane, 20; *Howard v. Pitt*, 1 Show. 402; *Fish v. Wiseman*, Palm. 449; S. C. Lut. 193.

(u) *Hiscocks v. Kemp*, 3 Ad. & E. 682, per Lord Denman.

(x) 2 Burr. 660; S. C., 2 Bl. Rep. 784; *Watkins v. Haydon*, 2 Bl. Rep. 762; *Powis v. Powis*, 6 B. Moore, 517; Com. Dig. tit. Pleader, 3, L, 4; 2 Tidd's Prac. 8th ed. 1156.

defendant who was so far from being surprised by the plaintiff's delay, that he himself had been trying all manner of methods whereby he might delay the plaintiff. The Court, therefore, discharged the rule with costs (y).

By the statute which established the securities of statutes merchant, statutes staple, and recognizances in the nature of statutes staple, the conusee of such a security may at any time within which a specialty or record is not barred (z), sue out execution thereon without the delay or charge of a *scire facias*, although more than a year and a day has elapsed after the day of payment assigned in the statute or recognizance (a). And so also if there be a new party affected by such a security, by death or otherwise, as if the conusee of a statute or recognizance should die before execution sued, his executors may come into Chancery, and upon their producing the testament and the statute they shall have execution without *scire facias*, as the testator himself might (b). So, if the conusor be returned dead by the sheriff, execution may either be taken out against his lands without a *scire facias* against his heir, or the conusee may sue it out against the heir and tenants at his election (c).

Scire facias not necessary from lapse of time to revive debt secured on a statute merchant, statute staple, or recognizance in the nature of a statute staple; nor in case of a new party to the record.

This advantage over any other securities known to the common law was given to these securities by the several Acts of Parliament that introduced them, the statute merchant, statute staple, and recognizance in the nature of a statute staple, being designed "to encourage strangers to trade with us," by the security of payment which they gave, and by the little delay with which they could be enforced (d).

These recognizances are by Blackstone termed recognizances of a "private kind," as contradistinguished to recognizances at common law (e). The latter securities, as will be seen hereafter, in most cases require a *scire facias* to be issued before they can be enforced (f).

These recognizances of a private kind.

(y) Formerly a different rule prevailed, and a *scire facias* was held to be necessary, although the injunction staying the execution beyond the year and day was obtained by the defendant on the ground that the common-law Courts could not take notice of the Chancery injunction; see *Booth v. Booth*, 1 Salk. 322; *S. C.*, 6 Mod. 288; *Winter v. Leighband*, 1 Stra. 301; and see *Hobson v. Earl of Darlington*, 3 P. Wms. 36; *Sympton v. Gray*, Barnes, 197; *Bac. Abr. tit. Execution*, H, 409; 2 V.

Wms. Saund, 72 e, n.

(z) *I. e.*, twenty years; see 3 & 4 Will. IV. c. 42, s. 3; and see ch. i. book i, p. 14, *ante*.

(a) *Bac. Abr. tit. Execution*, B, 2; see *ante*, ch. i. p. 9; 2 Inst. 395.

(b) *Bac. Abr. tit. Execution*, B, 3; 2 Inst. 471.

(c) 2 V. Wms. Saund. 71 c, note to *Underhill v. Devereux*.

(d) *Bac. Abr. ubi supra*.

(e) 2 Bla. Com 341, 160.

(f) See *post*, ch. iii. book iii.

In order, however, the better to understand the reason and the application of the exception in these cases to the two general rules, that if a debt of record has lain by more than a year and a day it shall be presumed to be satisfied, and must be revived by *scire facias*, and that where there is a new party to the suit the alteration in the process thereby requires that he shall be made a party by *scire facias*; a short review of these statutable securities, and of the mode of execution on them, may be useful, and will not here be out of place.

Nature of a
statute
merchant.

A *statute merchant* is a bond of record acknowledged before one of the clerks of the statute merchant and the mayor of the city of London, or two merchants of that city for that purpose assigned, or before the mayor or chief warden of some other city or town, or other discreet men for that purpose chosen and sworn when the mayor or chief warden cannot attend (*g*), pursuant to the Statute of Acton Burnel (*h*), (11 Edw. I. c. 1,) enforced and amended by

(*g*) Bac. Abr. tit. Execution, B; 2 Tidd's Prac. 8th ed. 1132.

(*h*) The following are the words of the statute: "Forasmuch as merchants, which heretofore have lent their goods to divers persons, be greatly impoverished because there is no speedy law provided for them to have recovery of their debts at the day of payment assigned; and by reason hereof many merchants have withdrawn to come into this realm with their merchandises, to the damage as well of the merchants as of the whole realm; the King by himself, and by his council hath ordained and established that the merchant which will be sure of his debts, shall cause his debtor to come *before the mayor of London, or of York, or of Bristol, or before the mayor and a clerk* (which the King shall appoint for the same) *for to knowledge the debt, and the day of payment*; and the recognizance shall be entered into a roll, with the hand of the said clerk which shall be known. Moreover, the said clerk shall make with his own hand a bill obligatory, whersunto the seal of the debtor shall be put, with the King's seal that shall be provided for the same pur-

pose, the which seal shall remain in the keeping of the mayor and clerk aforesaid: and if the debtor doth not pay at the day to him limited, the creditor may come before the said mayor and clerk with his bill obligatory; and if it be found by the roll and by the bill that the debt was knowledged, and that the day of payment is expired, the mayor, shall incontinent cause the moveables of the debtor to be sold, as far as the debt doth amount, by the praising of honest men as chattels, burgages desirable, until the whole sum of the debt, and the money, without delay, shall be paid to the creditor. And if the mayor can find no buyer, he shall cause the moveables to be delivered to the creditor at a reasonable price, as much as doth amount to the sum of the debt, in allowance of his debt; and the King's seal shall be put unto the sale and deliverance of the burgages deviseable for a perpetual witness. And if the debtor have no moveables within the jurisdiction of the mayor, whereupon the debt may be levied, but hath some otherwhere within the realm, then shall the mayor send the recognizance made before him and the clerk aforesaid, unto

the statute 18 Edw. I. st. 3, c. 1, *de Mercatoribus* (i). This recognizance is to be entered by the clerk on a roll which must be

the chancellor, under the King's seal, and the chancellor shall direct a writ unto the sheriff in whose bailiwick the moveables of the debtor be, and the sheriff shall cause him to agree with his creditor in such form as the mayor should have done in case that the moveables of the debtor had been within his power. And let them that shall praise the moveable goods, to be delivered unto the creditor, take good heed that they do set a reasonable price upon them; and if they do set an over high price for favour borne to the debtor, and to the damage of the creditor, then shall the things so praised be delivered unto themselves at such price as they have limited, and they shall be forthwith answerable unto the creditor for his debt. And if the debtor will say that his moveable goods were delivered or sold for less than they were worth, yet shall he have no remedy thereby; for when the mayor or the sheriff hath sold the moveable goods lawfully to him that offered most, he may account it his own folly that he did not sell his own moveable goods himself before the day of his suit (when he might and would not), and have levied the money with his own hands. And if the debtor have no moveables whereupon the debt may be levied, then shall his body be taken where it may be found, and kept in prison until that he have made agreement, or his friends for him; and if he have not wherewith he may sustain himself in prison, the creditor shall find him bread and water, to the end that he die not in prison for default of sustenance, the which costs the debtor shall recompense him with his debt, before that he be let out of prison. And if the creditor be a merchant stranger he shall remain at the costs of the debtor for so long time as he tarrieth about the suit of his debt, and until the

moveable goods of the debtor be sold or delivered unto him. And if the creditor do not take the debtor alone for the surety of his payment, by reason whereof pledges or mainpernors be founden, then those pledges or mainpernors shall come before the mayor and clerk above said, and shall bind themselves by writings and recognizances, as afore is said of the debtor. And in like manner if the debt be not paid at the day limited, such execution shall be awarded against the pledges or mainpernors, as before is said of the debtor.

" Provided nevertheless, that so long as the debt may be fully taken and levied of the goods moveable of the debtor, the mainpernors or pledges shall be without damage: notwithstanding, for default of moveable goods of the debtor, the creditor shall have execution of his recognizance upon the mainpernors or pledges, in such manner and form as before is limited against the principal debtor." See further, as to this statute, Gilb. Exch. 213.

(i) The following are the provisions of the Stat. *de Mercatoribus*: "Forasmuch as merchants, which heretofore have lent their goods to divers persons, be fallen in poverty because there is no speedy remedy provided, whereby they may shortly recover their debt at the day of payment; and for this cause many merchants do refrain to come into the realm with their merchandise to the damage of such merchants and of all the realm; the King and his Council, at his Parliament holden at Acton Burnel, after the Feast of St. Michael, the eleventh year of his reign, ordained establishments thereupon for the remedy of such merchants; which ordinances and establishments, the King commanded that they shall be firmly kept and observed throughout this

double, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand a bill obli-

realm, whereby merchants have had remedy and have recovered their debts with less inconvenience and trouble than they have had heretofore. But forasmuch as merchants after complained unto the King, that sheriffs misinterpreted his statutes, and sometimes by malice and false interpretation delayed the execution of the statute, to the great damage of merchants; the King at his Parliament holden at Westminster, after Easter, the thirteenth year of his reign, caused the said statute made at Acton Burnel to be rehearsed; and for the declaration of certain articles in the statute aforesaid, hath ordained and established, that a merchant who will be sure of his debt shall cause his debtor to come before the mayor of London, or before some chief warden of a city, or of another good town, where the King shall appoint, and before the mayor and chief warden, or other sufficient men chosen and sworn thereto, when the mayor or chief warden cannot attend, and before one of the clerks that the King shall thereto assign, when both cannot attend, he shall acknowledge the debt and the day of payment; and the recognizance shall be inrolled by one of the clerk's hands being known, and the roll shall be double, whereof one part shall remain with the mayor or chief warden, and the other with the clerks that thereto shall be first named; and further, one of the said clerks with his own hand shall write an obligation, to which writing the seal of the debtor shall be put with the King's seal provided for the same intent; which seal shall be of two pieces, whereof the greater piece shall remain in the custody of the mayor or chief warden and the other piece in the keeping of the aforesaid clerk. And if the debtor do not pay at the day limited unto him,

then shall the merchant come to the mayor and clerk with his obligation; and if it be found by the roll or writing that the debt was acknowledged, and the day of payment expired, the mayor or chief warden shall cause the body of the debtor to be taken (if he be lay) whensoever he happeneth to come in their power, and shall commit him to the prison of the town, if there be any, and he shall remain there at his own costs until he hath agreed for the debt. And it is commanded that the keeper of the town prison shall retain him upon the delivery of the mayor or warden; and if the keeper shall not receive him he shall be answerable for the debt, if he have whereof; and if he have not whereof, he that committed the prison to his keeping shall answer. And if the debtor cannot be found in the power of the mayor or chief warden, then shall the mayor or chief warden send into the Chancery, under the King's seal the recognizance of the debt; and the chancellor shall direct a writ unto the sheriff in whose shire the debtor shall be found, for to take his body (if he be lay) and safely to keep him in prison until he hath agreed for the debt; and within a quarter of a year after that he is taken, his chattels shall be delivered him, so that by his own he may levy and pay the debt; and it shall be lawful unto him, during the same quarter, to sell his lands and tenements for the discharge of his debts, and his sale shall be good and effectual. And if he do not agree within the quarter next after the quarter expired, all the lands and goods of the debtor shall be delivered unto the merchant by a reasonable extent, to hold them until such time as the debt is wholly levied; and nevertheless the body shall remain in prison as before is said, and the merchant shall find him bread and water;

gatory to which the seal of the debtor shall be affixed, together with the seal of the King for that purpose appointed.

and the merchant shall have such seisin in the lands and tenements delivered unto him or his assignee, that he may maintain a writ of *novel disseisin* if he be put out, and *redisseisin* also, as of freehold, to hold to him and his assigns until the debt be paid; and as soon as the debt is levied the body of the debtor shall be delivered with his lands. And in such writs as the chancellor doth award, mention shall be made, that the sheriff shall certify the justices of the one bench or of the other, how he hath performed the King's commandments, at a certain day, at which day the merchant shall sue before the justices, if agreement be not made; and if the sheriffs do not return the writ, or do return that the writ came too late, or that he hath directed it to the bailiffs of some franchise, the justices shall do as it is contained in the latter Statute of Westminster. And if in case the sheriff return, that the debtor cannot be found, or that he is a clerk, the merchant shall have writs to all the sheriffs where he shall have land, and that they shall deliver unto him all the goods and lands of the debtor by a reasonable extent, to hold unto him and his assigns in the form aforesaid; and at the last he shall have a writ to what sheriff he will, to take his body (if he be lay) and to retain it in manner aforesaid. And let the keeper of the prisoner take heed that he must answer for the body, or for the debt. And after the debtor's lands be delivered to the merchant, the debtor may lawfully sell his land, so that the merchant have no damage of the improvements; and the merchants shall always be allowed for their damages, and all costs, labours, suits, delays, and expenses reasonable. And if the debtor find sureties which do acknowledge themselves to be principal debtors, after the day passed the sureties shall be

ordered in all things as is said of the principal debtor, as to the arrest of body, delivery of lands, and other things. And when the lands of the debtors be delivered unto the merchants, he shall have *seisin* of all the lands that were in the hand of the debtor, the day of the recognizance made, in whose hands soever that they come after, either by feoffment or otherwise. And after the debt paid, the debtor's lands, and the issues of lands of debtors by feoffment shall return again, as well to the feoffee as the other lands unto the debtors. And if the debtor or his sureties die, the merchants shall have no authority to take the body of his heir, but he shall have his lands, as before is said, if he be of age, or when he shall be of full age. And a seal shall be provided that shall serve for fairs, and the same shall be sent unto every fair, under the King's seal, by a clerk sworn, or by the keeper of the fair. And of the *commonality of the merchants of the City of London, two merchants shall be chosen*, that shall swear, and the seal shall be opened before them, and the one piece shall be delivered unto the foresaid merchants and the other shall remain with the clerk; and before them, or one of the merchants (if both cannot attend) the recognizances shall be taken, as before is said. And before that any recognizance be inrolled, the pain of the statute shall be openly read before the debtor, so that after he cannot say that any did put another penalty than that whereunto he bound himself. And to maintain the costs of the said clerk, the King shall take of every pound a penny, in every town where the seal is, except fairs where he shall take one penny half-penny of the pound. This ordinance and act the King willeth to be observed from henceforth throughout his realm of England

The security and speedy remedy for the recovery of their debts which these recognizances gave to merchants soon led others not merchants to use them; for other men, finding from observation that it was much of the same nature with judgments given in Westminster Hall, but obtained with infinitely less trouble and expense, out of regard to their own interest and quiet, began to adopt this mode of securing their contracts, and by degrees it became to be improved into a common-law assurance (*j*).

"The addition of the King's seal," says Bacon, in his Abridgment, "which was never required to any contract at common law, was to authenticate and make the security of a higher nature than any other then known; for by this the King, in the person of the mayor, &c., attests the contract and takes consensance of the debt, and consequently execution is to be awarded upon failure of payment at the day assigned, without any mesne process to summon the debtor, or the trouble or charge of bringing in proofs to convict him; for the judges, who are the King's representatives for the more speedy administration of justice, require these on common contracts and specialties to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant; but to this contract the King himself, by the mayor, warden, &c., is a witness, and has the frank acknowledgment and confession of the debtor that he really owes so much, which is the best and surest proof the law requires; therefore the legislators of that time, out of a just regard to the prerogative and justice of the King on those contracts, as on judgments, allowed of an immediate execution; these being the surest means of conviction, viz., the confession of the consensor on record, which the judges at Westminster seldom have to frame their judgments on; and thus it must be presumed from the force of them, which is equal to judgments of the superior Courts, they obtained the name of *pocket judgments*."

It will however be observed, that, by the proviso to the Statute of Acton Burnel (*k*), the "mainpernors or pledges" (sureties) "shall

and Ireland, amongst the which people they that will may make such recognizances (except *Jews*, to whom this ordinance shall not extend). And by this statute a writ of debt shall not be abated: and the chancellor, justices of the one bench and the other, the barons of the Exchequer and justices errant, shall not be estopped to

take recognizances of debts of those who are willing to acknowledge them before them; but the execution of recognizances made before them shall not be done in the form aforesaid, but by the law and manner before used and otherwise provided in other statutes."

(*j*) Bac. Abr. tit. Execution, B.

(*k*) See *ante*, note to p. 72.

be without damage so long as the debt may be fully taken and levied of the goods moveable of the debtor." Before, therefore, the creditor can have execution against the *surety* for the amount of his debt so secured, he must be able to show that he cannot recover it from the principal. As against the sureties therefore, both on first principles as well as according to this provision of the statute, a *scire facias* would appear to be required before proceeding to recover the debt from them, to give them an opportunity of pleading and putting in issue, if they thought fit, the fact whether or no the debtor had available goods for the payment of his debt (l).

If a statute merchant be forfeited by the debtor not paying at the day named within it, if the conusor be within the jurisdiction of the mayor or other officer before whom the statute merchant was acknowledged and be found there, then, upon the conusee's bringing the statute, &c., to the mayor, &c., and clerk, and their finding the record of it and the day of payment lapsed, the mayor may apprehend and imprison the conusor (if he be lay), there to remain until he satisfies his creditor.

If the debtor be out of the jurisdiction of the mayor, &c., then shall he send the recognizance under the King's seal into Chancery, after which certificate the first process is a *capias* to take his body only; and, if upon this the sheriff returns a *cepi corpus*, the debtor shall remain in prison a quarter of a year, in which time he may dispose of his goods and lands to the best advantage to pay his debts. But if the conusor either omits to satisfy his creditor in that time, or if the sheriff returns on the *capias*, *non est inventus*, or the conusor dead, then shall the execution be granted against lands, goods, and chattels, and they be delivered to the conusee by a reasonable extent till the debt be levied, which writ of execution the sheriff is to return into the Q. B. or C. B., and how he hath performed the service (m).

And if the mayor, the debtor being out of his jurisdiction, will not on the prayer of the creditor certify the recognizance broken into the Chancery under his seal, according to the Statute of Acton Burnel, as he ought to do, then the recognissee may have a writ of execution upon the statute directed to the mayor (n).

(l) See *Brunkhorne's case*, Cro. Eliz. 233. "For the recognizance as to them is but as an obligation with a condition upon which they might well plead performance." And see *Penoyer v. Bruce*, 1 Salk. 320.

(m) Bac. Abr. tit. Execution, B, 359; 2 V. Wms. Saund. 71 c. n.; Com. Dig. tit. Statute Staple, D, 3.

(n) Fitzherbert's *Natura Brevium*, ed. 1794, vol. i. p. 130.

If the conusor is a clergyman he cannot be arrested; but the sheriff is commanded to levy the debt of his moveable goods and chattels by a writ of *levari facias* (o).

Nature of a
statute
staple.

A *statute staple* is a bond of record acknowledged before the mayor of the staple, in the presence of all or one of the constables of the staple (p), pursuant to the statute 27 Edw. III. st. 2, c. 9; and it is a security the object of which was, in the words of the statute, "that the contracts of merchants made within the staple (or market) shall be the better holden and the payments readily made." Anciently the place where the merchants resorted with their staple commodities was called *estapel*, which signified mart or market (q). This mart was sometimes established out of the

(o) 2 V. Wms. Saund. 70 c, n.; 2 Tidd's Prac. 8th ed. 1136.

(p) "There was appointed a Justice of Merchants at London in Edw. I.'s time, who afterwards upon the erection of the Staple was called "the Constable." Gilb. Exch. 210.

(q) The following is the statute 27 Edw. III. st. 2, c. 9, which gives this recognizance:—"Item, to the intent that the contracts made within the same staple shall be the better holden, and the payments readily made; We have ordained and established that every mayor of the said staples shall have power to take recognizances of debts which a man will make before him in the presence of the constables of the staple, or one of them; And that in every of the said staples be a seal ordained, remaining in the custody of the mayor of the staple, under the seals of the constables; and that all obligations which shall be made upon such recognizances be sealed with the said seal, paying for every obligation one hundred pounds and within, of every pound a half-penny, and of every obligation above one hundred pound a farthing. And that the mayor of the staple, by virtue of the same letters so sealed, may take and hold in prison the bodies of the debtors after the term incurred, if they be found within the staple, till they have made gree to the

creditor of the debt and damages; and also arrest the goods of the said debtors found within the said staple, and deliver the said goods (to the said creditors) by true estimation, or (to) sell them at the best a man may, and to deliver the money to the creditors until the sum due. And in case that the debtors be not found within the staple, nor their goods to the value of the debt, the same shall be certified in the Chancery under the said seal, by which certification a writ shall be sent to take the bodies of the said debtors without letting them to mainprise, and to seize their lands and tenements, goods and chattels; and the writ shall be returned in the Chancery with the certificate of the value of the said lands and tenements, goods and chattels; and thereupon due execution shall be made from day to day in manner as it is contained in the statute merchant, so that he to whom the debt is due shall have estate of freehold in the lands and tenements which shall be delivered to him by virtue of the same process and recovery by writ of *novel disseisin* in case if he be ousted; and that the debtor have no advantage of the quarter of a year which is contained in the said statute merchant. And in case that (no creditor will have letters) of the said seal, but will stand to the faith of the debtor, if after the term incurred he demand the debt, the

realm, as at Calais, Bruges, Antwerp, &c.; and sometimes it was held in the kingdom, at London, Westminster, Hull, &c. (r).

These markets were found to be of great use and consequence to the King as a means of revenue, as at these staple ports the King's customs were easily collected by the officers of the staple; and they also tended to the interest and credit of the nation, as all merchants' goods at these staples were examined and marked by proper officers, who detected and prevented the exportation of decayed and ill-wrought manufactures; and their mark consequently fixed a stamp of credit on the merchandises exported, which upon the view always answered the expectation of the buyer (s).

According to Lord Coke, there were five staple merchandises, viz., "wooll, woolfels, leather, lead, and tynne" (t); others added "butter, cheese, and clothes" (u).

In order more efficiently to carry out the law of the staple in towns not provided with proper officers, &c., to give binding effect to the obligations entered into at these markets, the statute 27 Edw. III. st. 2, c. 21, appointed, "in every town where the staple is ordained, a mayor, good, lawful, and sufficient, having knowledge of the law merchant, to govern the staple, and to do right to every man after the law aforesaid, without favour, sparing, or grief doing to any," together with "two covenable constables to do that pertaineth to their office;" and to the said mayor and constables power is given "to keep the peace, and to arrest offenders in the staples for debt, trespass, or other contract, and them to put in prison and punish after the law of the staple" (x).

debtor shall be believed upon (t): brought to the staple, and to be transported by foreign merchants; and it

(r) 4 Co. Inst. 238. "The bounds of the staple at Westminster begin at Temple Bar, and extend to Tuthill. In other cities and towns within the walls; where no walls be, the bounds of the staple shall extend through all the city or town."

(s) Bac. Abr. tit. Execution, B, 356; Gilb. Ex. 218. "Edward I., in the 27th year of his reign, appointed staple towns round England, Wales, and the Pale of Ireland."

(t) 4 Co. Inst. 238.

(u) Bac. Abr. tit. Execution, B, 356. See also Gilb. Ex. 219. "Wool, woolfels, leather, and lead were to be

(x) 4 Inst. 237; Gilb. Ex. 219.

"The staple had a judicature apart, and if any of the King's justices or other officers came into any of these places where the staple was, they had no authority in matters pertaining to the cognizance of the mayor and ministers of the staple in that place, either judicial or ministerial; and this is the reason we have so little concern in mercantile affairs in the old books."

By these statutes the mayor of the staple was empowered "to take recognizances of debts which a man will make before him, in the presence of the constables of the staple, or one of them," under a "seal ordained, remaining in the custody of the mayor under the seals of the constables." If such a recognizance were forfeited, the mayor of the staple, on application made to him, had power to arrest and imprison the debtor and seize his goods, which were to be sold or delivered to the creditor by a "true estimation" to satisfy his debt; and, if the debtor were not found in the staple, or his goods were not sufficient, then the mayor certified this under seal to the Chancery, upon which certificate a writ issued out of Chancery to arrest the debtor without privilege of bail, and to seize his lands, goods, and chattels, wherever found (y).

Immediate execution was therefore given by these statutes against the debtor's body, lands, and goods. This writ was returnable into Chancery only (x). After the extent made, the practice was to sue out a writ of *liberate* out of Chancery, reciting the former writ and return, and commanding the sheriff to deliver to the conusee all the lands, tenements, and chattels taken into the King's hands, if the conusee will have them by the extent and appraisement made thereof, until he should be satisfied his debt (a).

This power was given to merchants, "lest they should be diverted and drawn from their business and trade by applying to the common law and running through the tedious forms of it, for a determination of their differences; and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts without going out of the bounds of the staple" (b).

In time, however, other persons besides merchants of the staple began to resort to these securities in their contracts, and the mayor and constables would take recognizances from strangers, surmising that they were made for the payment of money for merchandises brought to the staple. To prevent this mischief the Parliament, by stat. 23 Hen. VIII. c. 6, s. 11, reduced the statute staple to its original limits, and imposed a penalty of 40*l*.

(y) See stat., n. *ante*.

(x) 4 Inst. 79; Com. Dig. tit. Stat. Staple, D; F. N. B. 131; Cro. Car. 451.

(a) 2 Tidd's Prac. 8th ed. 1136;

Com. Dig. tit. Stat. Staple, D, 6; Lut. 432; Dyer, 67 *b*.

(b) Bac. Abr. tit. Execution, B, 356.

on the mayor and constables, who should extend the benefit of the statute to any but those trading at the staple (c).

But though this statute, the 23rd of Hen. VIII. c. 6, deprived all but merchants and traders at the staple of the benefits of the security of the statute staple, it framed a new kind of security to be used *ad libitum* by all men, known by the name of a recognizance on the 23rd of Hen. VIII. c. 6, or a *recognizance in the nature of a statute staple*, so called because this act limits and appoints the same process, execution, and advantage in every particular as is set down in the statute staple (d), only the recognizance is to be acknowledged before other persons (e).

Of a recognizance in the nature of a statute staple.

By this statute recognizances in the nature of a statute staple for the payment of debts may be acknowledged before the Chief Justices of the Queen's Bench and Common Pleas, and each of them, or in their absence out of term, before the Mayor of the Staple at Westminster, and the Recorder of London jointly in the form given by the statute (f). In this as in the former cases the King appoints a seal to attest the contract, and each of the said justices shall have the keeping of one such seal, and the Mayor and Recorder another of the like print and fashion, and every obligation made and acknowledged before either of the justices, or the Mayor and Recorder, must be sealed with the seal of the conusor, the King's seal, and the seal of the Chief Justice, or seals of the Mayor and Recorder, before whom it is taken (g), who are likewise obliged to subscribe their names. Besides this the clerk of the recognizance (who is to be appointed for this purpose by the King), or his deputy, shall make and write all obligations thus acknowledged, and enrol them in two several rolls indented, one whereof shall remain with such of the said justices, or with the Mayor and Recorder that take the recognizance, and the other with the clerk (h), who is further obliged at the request of the conusee, his executors or administrators, to certify such obligation into Chancery under his seal (i). Section 7 gives a remedy by *audita querela* to all persons so bound, who shall be "grieved" by any execution taken out under the authority of this Act.

(c) *Ibid.*; 2 Tidd's Prac. 8th ed. 1133; 2 V. Wms. Saund. 70 a, n.

(d) Bac. Abr. tit. Execution, B, 357; 2 Tidd's Prac. 8th ed. 1133; 2 V. Wms. Saund. 71 c; Com. Dig. tit. Statute Staple, B; and see statute *in extenso*, 1 Chitty's Stats. 311, sect. 6.

(e) See sect. 2.

(f) See sect. 2; and 2 Tidd's Prac. 8th ed. 1133.

(g) Sect. 3.

(h) Sect. 4.

(i) Sect. 5; and see Bac. Abr. tit. Execution, B, 357.

On forfeiture of such an obligation the same process of execution is established as upon a statute staple (*k*), and the sheriff must return his writ into Chancery (*l*).

By stat. 27 Eliz. c. 4, ss. 7 and 8, the whole tenor and contents of statutes merchant, and statutes staple, shall within six months after they are acknowledged be entered in the office of the clerk of recognizances, taken according to the 23 Hen. VIII. c. 6, who is to enter the same statutes in a book provided for that purpose, and kept by him, and if they are not brought within four months after they are acknowledged to the clerk for the purpose of being so entered, they are made void against subsequent purchasers for money or other good consideration. Recognizances in the nature of a statute staple were held to be exempt from the operation of this Act, but by the 8 Geo. I. c. 25, s. 1, the clerk of recognizances in the nature of a statute staple (taken under the 23 Hen. VIII.) or his deputy, shall yearly prepare and keep three parchment rolls as usual, and at the times of acknowledging every such recognizance shall write on the said rolls the full tenor *in hæc verba* of every such recognizance, and one of the rolls shall contain all the recognizances taken before the Chief Justice of the Queen's Bench; another, the recognizances taken before the Chief Justice of the Common Pleas; and the other, the recognizances taken before the Mayor of the Staple at Westminster, and Recorder of London; and at the time of the acknowledgment the person before whom the recognizance is taken, and the party acknowledging the same, shall sign their respective names to the roll or enrolment of the recognizance, under the enrolment, as well as sign and seal the said recognizance, and that the three rolls shall at the end of the year be fixed together and be made one roll, and remain in the custody of the clerk, or his deputy at his public office, who shall keep a docket to refer to the said roll for the benefit of searchers by purchasers and others (*m*).

The statute merchant, having the seal of the conusor besides the King's seal, the conusee may waive the execution given by the stat. 13 Edw. I., and use it as an obligation by bringing an action of debt thereon: so may the conusee for the same reason, on a recognizance in the nature of a statute staple on the 23

(*k*) See sect. 6 of 23 Hen. VIII. c. 6; and *ante*, p. 78; Statute Staple; Com. Dig. tit. Statute Staple, B.

(*l*) Lut. 430; Com. Dig. *ubi supra*.

(*m*) 2 V. Wms. Saund. 70 *b*, n.; Bac. Abr. tit. Execution, B, 357; under

this stat., 8 Geo. I. c. 25, s. 4, a rentent may issue on a recognizance in nature of statute staple, if it be made appear to the Court of Chancery that sufficient was not levied under the first extent.

Hen. VIII. c. 6. But it is otherwise of a statute staple; because the King's seal only is affixed thereto, without that of the party, which is absolutely necessary in all obligations at common law (n). If the conusees neglect to enrol their recognizances within the time limited by statute, they are considered in equity in the nature of debts by bond only (o).

The General Stamp Act, 55 Geo. III. c. 184, regulates and appoints the stamps to be affixed to these instruments.

Hitherto, in describing the nature of these securities, nothing has appeared which could give them any advantage over debts on which a judgment had been obtained, or which could exempt the conusee from the necessity of reviving the debt by *scire facias* after a year and a day had elapsed after the forfeiture of the obligation, or where a new party had become bound by or interested in the obligation by death or otherwise. In this respect an advantage was first given to a statute merchant by the 5 Hen. IV. c. 12, which enacts, "Item, it is ordained and established that when any statute merchant is certified into the Chancery, and thereupon a writ awarded to the sheriff and returned into the Common Place, and the statute there once showed, that *howsoever the process after the same showing be discontinued*, that at what time the party sueth to have the process re-continued, and to have execution of the statute merchant aforesaid, that the justices of the bench where the statute was once showed may upon the same record make and award full execution of the statute merchant aforesaid, without having the sight or showing thereof another time after, and that this statute hold place of *all statutes merchant not fully executed at this time*." Origin and reason of exemption of these securities from the necessity of a *scire facias*, where required in other cases.

Though in terms confined to a "statute merchant," in its interpretation it appears to have been extended alike to the other securities of the same nature. For Bacon, in his Abridgment, after showing that the conusee of a recognizance at common law, if he do not take out execution within a year and a day after payment assigned in the recognizance, must have a *scire facias* to revive the judgment and put it in execution, says: "but the conusee of a statute merchant, &c., may at any time sue execution on *them* without the delay or charge of a *scire facias* (p).

Nor was this advantage confined to making such a security

(n) 2 Tidd's Prac. 8th ed. 1134; Ad. 153.

Bac. Abr. tit. Execution, B, 359; 2 V. Wms. Saund. 70 b, n.

(p) Bac. Abr. tit. Execution, B, 360, and authorities there quoted; 2 V. Wms. Saund. 71 c, n.

(o) *Bottomley v. Fairfax*, 1 P. Wms. 334; *Glyn v. Thorpe*, 1 B. &

available at any time without a *scire facias*, as pointed out in the statute of Hen. V., but seems to have been early extended also to those cases where there was a *new party to the record*, though the statutable authority for this is not so clear. It is however laid down by Lord Coke, that "one that is not party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit, and so likewise of the tenant or defendant's part; for the alteration of person altereth the process. Otherwise it is in case of a statute staple or merchant, &c., because the process is given by other Acts of Parliament (g). Bacon, in his Abridgment, says the reason of this advantage being given to these securities is because "they were designed to encourage strangers to trade with us."

Further research however on this subject would be perhaps more curious than useful, as these securities are now practically almost obsolete, though the statutes giving them are not repealed. Sufficient explanation has been given of the nature and object of these securities, and of the reason of their exemption from the ordinary rules requiring a *scire facias* in other cases.

Scire facias not necessary where a writ of execution has been taken out within the year.

Wherever process of execution has been taken out within the year after judgment, although it has not been served, it is not necessary to take out a *scire facias*, but the demandant or plaintiff may have execution at any time after the year (r). Formerly it was necessary to enter continuances on the roll, in order to keep alive a writ of execution (s), but now that continuances are abolished (t), the issuing of a writ of execution within the year after judgment, although it be not executed, has the same effect in keeping alive a judgment as when, under the old practice, continuances were entered. In *Harmer v. Johnson* (u) it was decided in the Court of Exchequer, that succeeding writs of execution need not be tested on the return day of the preceding writ, and may be sued out at any time afterwards without the necessity of entering continuances on the roll. In *Greenshields v. Harris* (x)

(g) Co. 2nd Inst. 471, 395; and see Bac. Abr. tit. Execution, B, 360; 2 V. Wms. Saund. 71 c. n.

(r) Co. 2nd Inst. 471; *ante*, ch. i. p. 10; Bac. Abr. tit. *Scire Facias*, C, 133.

(s) See the former practice, set out in 2 Tidd, Prac. 8th ed. 1155; Com. Dig. tit. Execution, I4, 141; 1 Sid. 59.

(t) R. G. H. T. 2 Will IV. r. 105; R. G. H. T. 4 Will. IV. r. 2, pl. 2; see *Jervis's New Rules*, 115.

(u) 14 M. & W. 336; S. C. 3 D. & L. 38.

(x) 9 M. & W. 776; S. C., 2 Dowl. N. S. 272.

it was decided, in the Court of Exchequer, that it was enough "if the plaintiff had materials for making up the roll in a regular manner," and therefore a *testatum ca. sa.* (issued into a different county to the original *ca. sa.* of *the same date*, and to which there was a general return of *non est inventus*,) under which the defendant was arrested more than a year from its date, was held to be sufficient, and the original to warrant the *testatum writ*; as a general return to the original *ca. sa.* of *non est inventus* might be presumed to have been made on the *same day*; and a writ of *ca. sa. runs until it is executed*. The whole law on this subject was very fully gone into in the case of *Simpson v. Heath* (y), in which it was settled that under the old authorities "if the plaintiff sue out process within the year, no *scire facias* is necessary, and he may act on that process. But if that process expire, he must continue it properly, and then execute that continued process." On this and the preceding case, therefore, it is clear that if the process issued be a *ca. sa.*, as "that runs until it is executed" (x), it is of force until it is executed, and if issued within the year after judgment, may be executed at any time afterwards (within which the judgment itself would be barred, by the statutes limiting the duration of a judgment debt) without the necessity of a *scire facias*. In the recent case of *Franklin v. Hodgkinson and Beale* (a), this question was again raised, and appears there to have been satisfactorily settled. In that case Williams, J., in delivering judgment said, "This was an application to set aside a writ of *fi. fa.* upon the ground that more than two years had elapsed since any step had been taken in the cause, and that therefore a writ of *scire facias* was necessary to revive the judgment, in order to authorize the issuing of the said writ of *fi. fa.* in this case. The facts of the case are as follow: final judgment was signed against both defendants on the 8th of June, 1843, and on the same day a writ of *ca. sa.* issued against both defendants. Upon this writ the defendant Hodgkinson was taken and was discharged under the Insolvent Act, in or about the month of

(y) 5 M. & W. 631.

(x) As to this see the stat. 3 & 4 Will. IV. c. 67 (the Uniformity of Process Act), s. 2, and the decisions upon it; *Greenhields v. Harris*, 9 M. & W. 774; *Thomas v. Harris*, 1 Dowl. N. S. 793; and *Harmer v. Johnson*, 14 M. & W. 336. "Writs of *ca. sa.*

in the new process have no fixed return day; they are returnable on execution only, and if not executed are not properly returnable at all." Per Parke, B., in *Harmer v. Johnson*, *ubi supra*.

(a) 3 D. & L. 554.

August in the same year, 1843. Against the other defendant, nothing was done upon the said writ of *ca. sa.*, but the same was unexecuted, and still remains in the sheriff's office so unexecuted as to him the defendant in question. Now the first observation to be made is, that the writ of *ca. sa.*, a writ in execution sued out in due time, (as was the case here,) with reference to the judgment, does not expire by lapse of time, as in mesne process, where the duration is limited, but such writ of *ca. sa.* remains in force until executed. This, I apprehend, is quite clear, and stands in need of no authority. But it may be mentioned that this is assumed as a principle in the case of *Greenshields v. Harris* (b), to which I shall have occasion to refer upon a point more immediately bearing upon the case. And the question now arises whether, in order to justify the issuing of the writ of *fi. fa.*, (the writ in question) a return should have been previously made to the *ca. sa.*, or whether it be sufficient that materials exist for completing the roll, so as to warrant the issuing of the *fi. fa.* If an actual return by the sheriff be indispensable, as that has not been made, the *fi. fa.* is irregularly sued out, otherwise if it be that sufficient materials exist for completing the roll. That there are such materials in the present case is clear, because, the writ of *ca. sa.* remaining in the sheriff's office unexecuted as to the present applicant, he (the sheriff) may return as to him *non est inventus*. Then is that enough? And upon this, the important and material part of the case, I feel that I ought to be governed by the decision of the Court in the before-mentioned case of *Greenshields v. Harris*. This is the language of the Court: 'In this case the writ *may* be regularly entered on the roll, and if there be materials to make the roll up that is sufficient. The production of the writs with the sheriff's return thereon, is an authority for the officer to make up the roll.' I think therefore that the rule must be discharged."

An actual return and filing, therefore, of the *ca. sa.*, provided it has been sued out within the year, is not necessary if the materials for making a return exist, in order to warrant the issuing of any other writ of execution, or putting in force the same writ of execution so unexecuted, at *any time* so long as it remains in force (c). As to a writ of *ca. sa.*, we have seen that it remains

(b) 2 Dowl. 272, N. S.; S. C., 9 M. 631; *Greenshields v. Harris*, 2 Dowl. & W. 775. N. S. 272.

(c) *Simpson v. Heath*, 5 M. & W.

in force till it is executed. And with respect to other writs of execution it has been long held that one sort of writ sued out, returned, and filed, will support the awarding of a different kind of execution afterwards; thus a *ca. sa.* or *elegit* may issue after the year upon a *fi. fa.* sued out, returned, and filed within the year (*d*).

So the writs of *fi. fa.*, *ca. sa.*, and *elegit*, may all be sued out at the same time, or several of each may be issued at the same time into several counties, since it is not necessary to enter them on, or even to carry in the roll, until one has been executed, and it becomes necessary to issue another (*e*). Formerly it was held that if either writ had been effectually executed, then nothing could be done on another till the first had been returned; as on principle two writs could not be had and acted upon at the same time (*f*). But now, supposing a *fi. fa.* were first issued within the year, and under it a part only of the debt had been realized, it seems, on the authority of *Franklin v. Hodgkinson* (*g*), and the cases above referred to, that new writs of either kind might issue for the residue, at any time after the year, without resorting to a *scire facias*, and this without first returning and filing the first writ (*h*).

It is no objection to a *scire facias* that it has been unnecessarily sued out, as where a *fi. fa.* has issued within a year after the judgment was entered up, so that the plaintiff might have had execution by continuing it without a *scire facias* (*i*). But if any goods have been seized under the *fi. fa.*, that may be pleaded as a satisfaction, so far as they go to liquidate the debt (*i*).

This exemption from the necessity of issuing a writ of *scire facias* applies, however, only to the time when, but for the previous issuing within the year after the judgment of a writ of execution, a writ of *scire facias* would be required: there is no exemption in such cases from the necessity of issuing a writ of

No objection to a *scire facias* that has been unnecessarily sued out.

This exemption applies only to the time of issuing the writ, and not to cases where there is a new

(*d*) 2 V. Wms. Saund. 68 *g*, n.; in *Aires v. Hardress*, 1 Stra. 100, "a *fi. fa.* was taken out within the year, and *nulla bona* returned and continued down for several years, and then a *ca. sa.* issued, and it was questioned whether or no this was regular. The Court, after taking time to inquire, said that if this were a new case they should think it hard to take away all writs of *scire facias*, but the practice had gone so far

there was no overturning it now, wherefore the execution was held regular."

(*e*) *Deever v. Brookes*, 4 D. P. C. 9.

(*f*) *Hodgkinson v. Whalley*, 2 Cr. & J. 86; see Lush's Prac. 500; and see 1 Chitty's Arch. Prac. 8th ed. 528.

(*g*) 3 D. & L. 554.

(*h*) 2 Chitty's Arch. Prac. 8th ed. 1012.

(*i*) *Holmes v. Newlands*, 5 Q. B. 634; *ibid.* 367.

party to the record.

Scire facias not necessary to revive judgment on a warrant of attorney given by an insolvent under 1 & 2 Vict. c. 110, sect. 87, by reason of lapse of time.

Exemption confined to case where required by lapse of time.

scire facias, where it is required on other grounds—as where a *new party* is sought to be made chargeable (l).

By the 1 & 2 Vict. c. 110, s. 87, which requires an insolvent debtor to execute a warrant of attorney to his assignees authorizing the entering up of a judgment against him for the amount of his debts, which judgment is to have the force of a recognizance and, by leave of one of the superior Courts, may be put in execution at any time for such sum as under the circumstances of the case the Court may order; it is enacted, that “no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the said Court” (m).

This statutable exemption from the necessity of issuing a *scire facias* where by *lapse of time* it would be required in ordinary cases, is confined to that circumstance; and there is nothing in the section to extend the exemption to those cases in which there is a change of parties by death or otherwise—as where the executor or administrator of an assignee should seek to put in force such a recognizance,—and in which in ordinary cases a *scire facias* would be necessary because of there being a *new party* to the record (n).

(l) See *ante*, book i. ch. i. p. 9.

(m) See *ante*, book i. ch. i. p. 10; 2 Chitty's Arch. Prac. 8th ed. 1013.

(n) The following is the 87th sect. of the stat. 1 & 2 Vict. c. 110:—“And be it enacted, That before any such adjudication shall be made with respect to any such prisoner, the said Court or commissioner, or justices, shall require such prisoner to execute a warrant of attorney to authorize the entering up of a judgment against such prisoner in some one of the superior Courts at Westminster, in the name of the assignee or assignees of such prisoner, or of such provisional assignee, if no other assignee shall have been appointed and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner so sworn to as aforesaid, to be due or claimed to be due from such prisoner, or so much thereof as shall appear at the time of executing such warrant of attorney, to be due and unsatisfied; and any such

warrant of attorney is hereby declared not to be within the meaning of the said act passed in the third year of the reign of his late majesty King Geo. IV. nor shall it be necessary that the same should be executed in the presence of an attorney for such prisoner, according to the provision hereinbefore in that behalf contained; and the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment *shall have the force of a recognizance*; and if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment, for such sum of money as, under all the circumstances of the case, the said Court shall order, such sum to be distributed rateably amongst the creditors

So also it seems, that under the 18th section of the same statute (1 & 2 Vict. c. 110), a writ of execution may issue on a rule of Court after the expiration of a year and a day, without a *scire facias*, or any application to the Court.

By that section of this statute, it is enacted "that all decrees and orders of Courts of equity, and *all rules of Court of common law*, and all orders of the Lord Chancellor, or of the Court of Review, in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior Courts of common law; and the persons to whom any such moneys, or costs, charges, or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the judges of the superior Courts of common law, with respect to matters depending in the same Courts, shall and may be exercised by Courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors, are in like manner given to persons to whom any moneys or costs, charges or expenses, are by such orders or rules respectively directed to be paid."

Scire facias not necessary to revive a rule of Court in the nature of a judgment under 1 & 2 Vict. c. 110, s. 18, on account of lapse of time.

In the case of *Spooner v. Payne* (o), the construction of this section of the statute devolved upon the Court of Queen's Bench. In that case a rule was obtained by the defendant for setting aside an award made in the cause, which rule was *discharged with costs*. The costs were taxed, the Master's *allocatur* bearing date the 7th of February, 1845; and on the 17th of November, 1846,

of such prisoner according to the mode hereinbefore directed in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said Court shall think fit to award; and no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execu-

tion shall at all times issue thereon by virtue of the order of the said Court: Provided always, that in case any such application against any such prisoner shall appear to the said Court to be ill-founded and vexatious, it shall be lawful for the said Court, not only to refuse to make any order on such application, but also to dismiss the same, with such costs against the party or parties making the same as to the said Court shall appear reasonable, and the said costs shall be paid accordingly."

(o) 17 L. J., N. S., Q. B. 68; S. C., 11 Q. B. 136.

the defendant was arrested on a *ca. sa.*, no *scire facias* having issued on the *allocatur*. A rule was afterwards obtained, calling on the plaintiff to show cause "why the writ of *ca. sa.* issued in this cause should not be set aside, and why the defendant should not be discharged out of custody," and after argument the Court held "that no *scire facias* or special leave was made necessary by the stat. (1 & 2 Vict. c. 110, s. 18), or by any legal principle; and that according to the practice now existing, the proceedings were regular," and the rule was discharged (*p*).

A rule of Court reducing the amount of a verdict, is however no answer to a *scire facias* on a judgment founded on that verdict; but an application must be made to the Court to set aside the judgment, on the ground that a remedy had been obtained in the rule (*q*).

Scire facias not necessary since the stats. 7 & 8 Vict. cc. 110 & 113, in order to have execution against a member of a joint-stock or banking company, incorporated under either of those Acts, on a judgment obtained against the public officer of such company.

It has been seen that it is a rule, whenever it is sought to fix a party on a judgment given against another, that it must be done by *scire facias* (*r*), to which, if the party sought to be fixed have any answer or defence, he may plead it. The case of *Cross and others v. Law, Public Officer*, (in which this rule was established in cases of public companies, where the public officer was sued, and on judgment being obtained against him it was sought to issue execution against a member of such a company), arose on the Banking Co-partnership Act, the 7th Geo. IV. c. 46, the 13th section of which statute enacts, that "execution upon any judgment, in any action obtained against a public officer for the time being, of any such corporation or co-partnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members for the time being, of such corporation or co-partnership &c." And the same principle was affirmed on error in the Exchequer Chamber, in the case of *Ransford, Public Officer, v. Bosanquet* (*s*).

The same rule was held to apply to joint-stock trading companies, in the then existing Acts, relating to which was a similar provision to that contained in the Banking Co-partnership Act, 7 Geo. IV. c. 46, ss. 12 and 13 (*t*). And so the rule continued

(*p*) See further as to the practice, *Cetti v. Bartlett*, 9 M. & W. 840.

(*q*) *Farmer (Executrix) v. Mottram*, 6 M. & G. 684; S. C. 1 D. & L. 781.

(*r*) See *ante*, ch. i. p. 6; and see *Cross v. Law*, 6 M. & W. 223; and *Ransford v. Bosanquet and others*, 12

Ad. & E. 813; and 2 Q. B. 972; and see *post*, book ii. ch. i. and ii.

(*s*) 2 Q. B. 972.

(*t*) See 4 & 5 Will. IV. c. 94, s. 3 (The Trading Companies Act); and 7 Will. IV. & 1 Vict. c. 73, s. 24, *ibid*.

until it was altered, as to subsequent companies, by statutory enactments passed in the 7 & 8 Vict., both with regard to joint-stock companies generally, and to joint-stock banking companies. By the Joint-stock Companies Act, the 7 & 8 Vict. c. 110, s. 68, it is enacted that, in the cases provided by this Act for execution, on any judgment, decree, or order, in any action or suit, against a joint-stock company, to be issued against the person, or against the property and effects of any shareholder, or former shareholder of such company, such execution may be issued by leave of the Court, or of a judge of the Court in which such judgment, decree, or order, shall have been obtained, upon motion or a summons for a rule to show cause, or other motion or summons consistent with the practice of the Court, *without any suggestion, or scire facias in that behalf*: provided that no such motion shall be made, nor summons granted, for the purpose of charging any shareholder, or former shareholder *until ten days' notice* (t) thereof shall have been given to the person sought to be charged thereby (u).

(t) As to the requirements of this notice see *post*, book ii. ch. ii. and *Corder v. Universal Gas-light Company*, 17 L. J., N. S., C. P. 305; S. C., 6 C. B. 19, and 4 C. B. 554.

(u) The following is the 68th sect. of the 7 & 8 Vict. c. 110, in full:—"And be it enacted, that in the case provided by this Act for execution on any judgment, decree, or order in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder, or former shareholder of such company, or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company, such execution may be issued by leave of the Court, or of a judge of the Court, in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the Court, without any suggestion or *scire facias* in that

behalf; and that it shall be lawful for such Court or judge to make absolute or discharge such rule, or allow or dismiss such motion (as the case may be) and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Court or judges shall seem fit; and in such cases such form of writs of execution shall be sued out of the Courts of law and equity respectively for giving effect to the provision in that behalf aforesaid, as the judges of such Courts respectively shall from time to time think fit to order, and the execution of such writs shall be enforced in like manner as writs of execution are now enforced: Provided that any order made by a judge as aforesaid may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order: Provided also, that no such motion shall be made, nor summons granted, for the purpose of charging any shareholder or former shareholder, until ten days' notice thereof shall have been given to the person sought to be charged thereby."

By the Joint-stock Banking Companies Act, 7 & 8 Vict. c. 113, sect. 13, the same provision, *totidem verbis*, is enacted relating to executions against the members of joint-stock banks on any "judgment, decree, or order in any action or suit against the Company."

In all companies, therefore, constituted *since* the passing of these last two statutes, and incorporated under their provisions, a *scire facias* is not required in order to make a shareholder of such a company liable to execution on a judgment given against the company or against its public officer; but the course pointed out by these statutes of obtaining the leave of the Court in which such judgment was obtained, to issue execution against a shareholder on motion for a rule to show cause, after ten days' notice to the party sought to be charged, is substituted. As to all companies, however, constituted anterior to these statutes, and incorporated under the provisions of the pre-existing statutes relating to joint-stock companies, and banking co-partnerships, the general rule still prevails as laid down in *Cross and others v. Law, Public Officer*, and *Ransford v. Bosanquet and others (v)*.

A rather singular experiment has, however, recently been made—(for as yet it can only be called an experiment)—to evade the decision arrived at by the Courts as to the necessity of issuing a *scire facias* in order to charge the shareholder of a public company incorporated under the statutes passed prior to the 7 & 8 Vict. cc. 110 and 113. In Michaelmas Term, 1847, an application was made to the Court of Common Pleas, *ex parte Ness (x)*, to allow the Master to register a judgment obtained against the public officer of the North of England Joint-stock Banking Company, by a Mr. John Ness, so as to bind the landed estate of Mr. James Sanderson of Berwick, at that time, as it appeared by affidavit, one of the co-partners of the banking company, in the last general return made by the company to the stamp office, under the provisions of the 7 Geo. IV. c. 46, s. 4. The banking company it appeared was established under the provisions of the 7 Geo. IV. c. 46, and a judgment had been obtained against the

Experiment to render liable to execution the lands of a partner in a banking company framed under the provisions of 7 Geo. IV. c. 46, without resorting to a *scire facias*.

(v) *Ubi supra*; and see the case of *Burns, Pub. Off. v. Scott, Pub. Off. in re Brook*, T. T. 1848, Q. B. (Joint-stock Companies, Law Journal, vol. i. 15); *Harvey, Pub. Off. v. Scott, Pub. Off.* 11 Q. B. 92; 12 Jurist, Jan. 15, 1848; 17 L. J., N. S., Q. B. 9; see judgment of Coleridge, J., *ibid.*; *Field*

v. McKenzie, Pub. Off. 17 L. J., C. P., 98; *Bosanquet and others v. Woodford and others*, 5 Q. B. 310; *Eardley v. Law*, 12 Ad. & E. 802; and see *post*, book ii. ch. ii. where this branch of the subject is fully discussed.

(x) MS. and see 17 L. J., N. S., C. P. 15; S. C., 5 D. & L. 339.

public officer of the company under the 9th sect. of that statute. By the 12th sect. of the statute, "all and every judgment and judgments, decree or decrees, which shall at any time be had or recovered, or entered up in any action, suit, or proceedings in law or equity against any public officer of any such co-partnership, shall have the like effect and operation upon and against the *property of such co-partnership*, and upon and *against the property of every such member thereof* as if such judgment had been recovered or obtained *against such co-partnership*." It was submitted that the judgment obtained against the public officer was, under this section, of the like effect as if it had been obtained against every member of the co-partnership, and the application was for the Master to be directed to register the judgment under the 1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11, s. 2, "forthwith" (in the terms of the latter section), so as to bind the lands of the partner sought to be charged. The Master declined to do this without the direction of the Court. The Lord Chief Justice said, "The general principle had been to make the partner liable by *scire facias*," and the Court after a short consultation declined to interfere extra-judicially, or to intimate an opinion on a subject which might on some future occasion be presented in a more serious form for the consideration of the Court, and left it to the Master to exercise his own discretion whether or no he would "forthwith" enter the name of the partner sought to be charged in the memorandum of the judgment obtained against the public officer, so as to affect and bind the lands of such partner against any subsequent mortgagees or purchasers, and enable the sheriff to deliver execution of such lands to Mr. Ness, under the 11th sect. of the 1 & 2 Vict. c. 110. It is understood that the Master in the exercise of this discretion (having a grave responsibility cast upon him) made the required entry in the memorandum of the judgment. The result of this proceeding has not yet transpired. But its effect, if successful, seems clearly to be an evasion of the rule laid down in *Cross v. Law* (y), that "wherever it is sought to fix one party on a judgment given against another it must be done by *scire facias*;" the partner ought to be charged, Mr. Sanderson not being named on the record on which judgment had been obtained against the public officer of the company, nor made a party to that record by *scire facias*; and this on a construction of the 12th and 13th sects. of the 7 Geo. IV. c. 46, directly contrary to the recently decided cases in the Courts of Queen's Bench and Exchequer above referred to (y).

(y) *Cross and others v. Law*, 6 M. & W. 217; *Ransford, Pub. Off. v. Bosanquet and others*, 2 Q. B. 972.

In *Ransford v. Bosanquet* (a), which was argued on error from the Queen's Bench, the Court expressly affirmed the general rule "that a person not party to the record *shall not be affected by it* without a *scire facias*."

It is understood that some refined distinction is attempted to be drawn between registering a judgment against a man's lands and proceeding to execution, which cannot be done under the 13th sect. of the statute, according to the decisions in *Cross v. Law*, and *Ransford v. Bosanquet*, without a *scire facias*; and that binding the lands and levying the debt are two distinct things. But it can hardly be said, it would seem, that binding a person's lands under a judgment on a record to which that person is not a party, is "not affecting him" by such judgment; or, that it is not (in the words of the judgment in *Cross v. Law*) "a proceeding upon the judgment against one of the members of the company not on the record," for which a *scire facias* is required in order to make the judgment and execution consistent with each other (b).

Scire facias not necessary for the Crown to revive its debts because of lapse of time.

Lastly, in case of a debt of record due to the Crown the ordinary presumption that the debt is satisfied after a year and a day does not arise, and the principle that "*nullum tempus occurrit Regi*," renders it unnecessary, because of the mere lapse of time to revive by *scire facias* a debt of record due to the Queen (c). On the contrary, in the case of a debt of record to the Queen the debt is presumed not to be paid, because if it were paid it would appear upon record; and if the debt were by bond, "when the debtor had got his tally, it is presumed he would move for an exoneration from his bond" (d). The reason for this exemption in the case of the Crown is, "because the King is supposed by public business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to the King," nor "does the law allow laches to be imputed to him" (e).

Scire facias not necessary for the Crown in the case of the death of its debtor,

So in the case of the death of a debtor to the Crown, although a *new party* must be proceeded against for its recovery, as the heir, executor, or administrator, yet a *scire facias* is unnecessary for the Queen (f). In such a case the proceeding is by writ of *diem*

(a) 2 Q. B. 977.

(b) *Harwood v. Law*, 7 M. & W. 207; "otherwise there would be judgment against A. and an execution upon it against B., which would render the record absurd and inconsistent;" and see *Clowes v. Bretell*, 11 M. & W. 461; *S. C.*, 2 Dowl. N. S. 528.

(c) See *ante*, ch. i. p. 10; 2 Salk.

603, *Anon.* "In the case of the King there need not be any *scire facias* after the year;" 2 Tidd, 1090, 8th ed.

(d) Gilb. Exch. 166; 1 Price, 395; West on Extents, 316.

(e) Gilb. Exch. 91; 2 Tidd, 1140, 8th ed.

(f) 2 Tidd, 8th ed. 1140; Com. Dig. tit. Debt, G, 5; "the King may

clausit extremum against his lands and chattels. This writ directs the sheriff to inquire by means of a jury when and where the Crown debtor died, and what goods and chattels, debts, credits, specialties, and sums of money, and what lands the said debtor had at the time of his death, &c., and to take and seize the same into the King's hands (*g*). This writ can only issue for a debt of record, and when the party died indebted to the King (*h*). But if he die indebted to the King by simple contract, and that debt be found by inquisition after his death, that is sufficient. But it cannot issue against the estate of a deceased debtor of a debtor of the King, unless the debt were found by inquisition in his lifetime (*i*).

because execution must issue against a new party.

And by stat. 33 Hen. VIII. c. 39, if any debt of record due to the Queen is in danger of being lost, a speedy remedy by writ of extent is given to the Crown under which, on affidavit that the Crown debt is in danger, execution may be immediately obtained without the necessity of the delay of a *scire facias*, which in all ordinary cases is required even in the case of the Crown (*j*). Debts due to the Crown may be divided into three classes—simple-contract debts, debts due by bond or specialty, and debts due on recognizances.

Scire facias not necessary for the Crown on debts of record, where the execution is a first proceeding without any previous judicial inquiry, on an affidavit that the debt is in danger of being lost.

On a simple-contract debt, as the extent is a writ of execution, the Court of Exchequer cannot on any principle issue it until the suit is ripe for it, that is when the debt is recorded. In order therefore to record a simple-contract debt to the Crown, a commission issues under which an inquisition is held to find the debt, and the inquisition when returned becomes matter of record (*k*). The commission is issued by the clerk in Court of the Crown, and is directed to two commissioners, and it requires them to inquire, on the oaths of good and lawful men, whether the defendant be not indebted to her Majesty in any and what sums of money, and to return the inquisition taken thereon at the return of the commission, and it commands the sheriff to cause a jury to attend before the commissioners, and it empowers the commissioners to summon witnesses (*l*).

seize the lands of his debtor upon his death."

(*g*) West on Extents, 319; 2 Tidd, 8th ed. 1104. "Wherever an extent might have issued in a man's life, a *diem clausit extremum* may issue against his estate at his death:" *Rex v. Mischever*, Bunb. 118.

(*h*) *Rex v. Curtis*, Parker's Rep. 98;

West on Extents, 320.

(*i*) West on Extents, 320; *Rex v. Boon*, Parker's Rep. 16.

(*j*) West on Extents, pp. 18, 316; and see *post*, book iii. ch. vii. and viii.

(*k*) West on Extents, 20.

(*l*) West on Extents, 21; 5 Price, 614; 2 Tidd, 8th ed. 1093.

The debt so found and recorded, on an affidavit that it is in danger, may be immediately levied by extent (*l*).

Secondly, as to debts due to the Crown by specialty. Anciently, bonds given to the Crown were given with a warrant of attorney to confess judgment, and then, though the King could not have execution of his bond debt which was not of record, yet he could issue an extent on the judgment confessed to him. But by the 33 Hen. VIII. c. 39, a bond given to the King was made to be of "the same nature, kind, quality, force, and effect, to all intents and purposes, as a statute staple (*m*), and by consequence he could sue out a writ of *levari facias* upon it." And this writ will issue immediately upon affidavit before a Baron that the Queen's debt is in danger (*n*). It was at one time held that on a bond or recognizance to the King for the performance of covenants or other collateral things, a *scire facias* should always first issue and not an immediate extent (*o*); but it was afterwards decided that *on an affidavit of danger, and that the condition of the bond was broken*, an immediate extent might issue in every case, as well where the bond was for the payment of a sum certain, as where it was for the performance of covenants or other collateral acts (*p*).

A recognizance at common law to the Crown is an obligation of record entered into by a person or by sureties before some Court of Record, or magistrate duly authorized with condition to do, or that some person shall do some particular act (*q*). A recognizance by statute is founded on a statute merchant or statute staple, or is in the nature of a statute staple, by the 23 Hen. VIII. c. 6, of which we have before treated (*r*). On an affidavit of danger, and that the recognizance is forfeited, an immediate extent it seems may by the Queen's prerogative issue to seize the debtor's body, lands, and goods for the amount (*s*) without any *scire facias*.

In all these cases, however, the ordinary and the proper mode of proceeding, where it is doubtful whether the bond or recognizance be forfeited, is by *scire facias* (*t*), in which the debtor

(*l*) See 2 Tidd, 8th ed. 1093.

(*m*) Gilb. Exch. 166; 2 Tidd, 8th ed. 1091; and see *ante*, Statute Staple, p. 78.

(*n*) Gilb. Exch. 166 and 102.

(*o*) *Rex v. Bishop of Exeter*, West on Extents, Append. and 48.

(*p*) *Rex v. Moseley*, West on Extents, Append. 325; Bunb. 203; West on Extents, 47, 48.

(*q*) 2 Tidd, 8th ed. 1131; Com.

Dig. tit. Debt, G, 1; "if a man gives an obligation, recognizance, &c. to the King, he becomes indebted to the King."

(*r*) See *ante*; and 2 Tidd, 1132, *et seq.*

(*s*) 2 Tidd, 8th ed. 1090; Gilb. Exch. 53.

(*t*) Gilb. Exch. 166; 2 Tidd, 8th ed. 1092.

has an opportunity of pleading a denial of the debt, that the condition of the bond has not been broken, that the recognizance is not forfeited, or a release or pardon, or other matter of excuse; and it is only in cases where the Queen's debt is in danger of being lost, and on an affidavit of that fact, that a writ of immediate extent is allowed to issue (u). And when the debtor is solvent, the Queen has not an election to proceed against him, either by extent or *scire facias*, but the latter is the only course (v). The power to issue writs of *capias*, *extendi facias*, &c., in such cases was given by the 33 Hen. VIII. c. 39, "if need shall require," "as unto the said Court shall be thought by its discretion expedient, for the speedy recovery of the King's debts."

"The immediate *extendi facias*, therefore, is only issued when the Court in its discretion thinks that need does require. The exercise of this discretion is shown by the fiat which the Court, or (according to the modern practice) any one of the Barons grants; and the need is shown by the affidavit of the insolvency of the defendant, and the danger of the debt being lost; at the foot of which affidavit the fiat is written by the Baron (w)."

It is also one of the prerogatives of the Queen to take assignments of the debts of her debtors (x), which by the common law of England no subject could do (y). And if any person is indebted to the King's debtor, by specialty of record, and the King's debtor has reason to believe that the debt to him is in danger; he can procure an extent to be issued *pro forma* against himself, under which an inquisition is taken of "his debts, credits, specialties, and sums of money in whosoever's hands they be," and on this inquisition the sheriff may seize for the debt due to the Crown debtor, as due to the Crown (z). This writ is called an *extent in aid* (a). By the Statute 57 Geo. III. c. 117, the operation of this writ has been confined to cases where persons are indebted to the Crown by debts of record and specialty, except in certain cases

Nor is it necessary before extending the debt of the King's debtor, on an affidavit of danger.

(u) 2 Tidd. 1104; West, 18.

(v) 3 Price, 288, 292; 2 Tidd, 8th ed. 1092.

(w) West, 19, 47; 2 Tidd. 8th ed. 1110.

(x) Gilb. Ex. 166.

(y) This is done now by bills of exchange under the law merchant.

(z) "A debt due to the King's debtor shall be extended for the King's debt;" Com. Dig. Debt, G, 7.

(a) West. 15; *Rex v. Gibbon*, Bunb.

Rep. 24. "It was said in this case that if an extent issue against A., who is indebted to the Crown, and B. upon the inquisition is found indebted to A., upon the return of that inquisition, and upon affidavit made that the money in B.'s hands is in danger of being lost, an immediate extent shall issue against B." And see *Rex v. Taylor and another*, *ibid.* 127; *Rex v. Enderupp*, *ibid.* 134.

mentioned in the statute; but when a Crown debtor is entitled to an extent in aid, he may still issue it for a simple-contract debt due to himself (*b*), on affidavit that it is in danger of being lost (*c*). Without this special reason it would seem that the Court cannot give warrant for a present extent in aid, but the proceeding must be by *scire facias* (*d*) in the ordinary mode.

It has been decided that debts due in the third degree may be seized under an extent in aid (*e*). Debts to the King's debtor are not bound till the teste of the inquisition (*f*). All debts to the Queen bind the lands of a debtor from the time they are contracted; and his goods from the teste of the extent (*g*).

Having now treated of the exceptional cases to the ordinary rules requiring a *scire facias* to issue before execution can be had of a debt of record, we will proceed to consider the second branch of the subject where a *scire facias* is required because a new party not on the record becomes interested in the judgment.

(*b*) 2 Tidd, 1108.

(*c*) *Rex v. Gibbon*, *ubi supra*.

(*d*) Gilb. Exch. 168; 2 Tidd, 8th ed. 1116.

(*e*) *King v. Lushington*, 1 Price, 95; West, 299—303; "Simple-contract debts may be found and seized in the

third degree, but not beyond it."—*Ewin's case*, Parker, 259.

(*f*) *Attorney-General v. Howell*, Bunb. 199.

(*g*) Gilb. Exch. 88, 89, 90; West, 162, 96; *Reg. v. Arnold*, 7 Viner, 104.

BOOK THE SECOND.

CHAPTER I.

OF THE WRIT OF SCIRE FACIAS TO REVIVE A JUDGMENT
WHERE THERE IS A NEW PARTY TO THE SUIT.

The Rule where a new Party to the Suit, p. 99.

Scire facias not necessary where Party not beneficially interested, p. 100.

Foundation of the Rule, p. 100.

Reason of the Rule, p. 100.

Formerly a Suggestion on the Roll thought sufficient, p. 101.

But this Decision now overruled, p. 102.

A Suggestion is applicable only to collateral Facts, p. 102.

Scire facias necessary before pro-

ceeding against a Member of a Public Company, after Judgment against the Registered Officer, p. 103.

Even where the Company's Act enacts that it shall not be necessary, p. 103.

Scire facias not necessary in case of Survivorship, Suggestion sufficient, p. 104.

So where a nominal Plaintiff or Defendant is added to the Record, p. 104.

Application of the Rule, p. 105.

It has been already briefly stated in the first and introductory chapter (a), that it is a general rule that in all cases where a new person, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment (b). But where the execution is not beneficial or charge-

The rule where a new party the suit.

(a) *Ante*, Introduction, p. 6.

(b) 2 V. Wms. Saund, 6, n. 1; Fitz. Execution, 143; and see generally, Bac. Abr. tit. Scire Facias, B, C, 4; 2 V. Wms. Saund, 71c, n.; 2 Chitty's Arch. 8th ed. 1016; Bac. Abr. tit. Execution, F. "One that is not party to the record, recognizance, fine, or judgment,

as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit; and so likewise of the tenant or defendant's part; for the alteration of person alter eth the process."—2 Co. Inst. 471.

Scire facias not necessary where party not beneficially interested.

able to a person who was not party to the judgment, then it seems this rule does not apply, and a *scire facias* is unnecessary (c), a suggestion of the change of party on the roll in that case being sufficient (d).

Foundation of the rule.

This rule is founded on the decision of Lord Holt in *Penoyer v. Brace* (e), "that where any new person is either to be better or worse by the execution, there must be a *scire facias* because he is a stranger, to make him a party to the judgment, as in case of executor or administrator, otherwise where the execution is neither to charge nor benefit any new party as in the case of survivorship, for there is no reason why death should make the condition of the survivors better than before."

Reason of the rule.

The reason for the rule is that the execution must be warranted by the judgment, and the new party being a stranger to the judgment, he not being named on the record, the judgment would not warrant any execution for or against him, until he should be made a party to it (f). The proceeding by *scire facias*, where there is a new party to the suit, is therefore adopted in order to make the record consistent with itself. This is well explained by Lord Abinger in giving judgment in the case of *Harwood v. Law* (g): "When the Courts direct a *scire facias* to issue, it is only with the view of rendering their own records consistent. The first case in which a question of this kind arose was that of *Bartlett v. Pentland* (h), where the plaintiff having obtained judgment against the secretary of the St. Patrick's Assurance Company,

(c) 2 Tidd, 8th ed. 1166; *Webb, Pub. Off. v. Taylor*, 1 D. & L. 676.

(d) *Bradley v. Eyre*, 11 M. & W. 450; S. C., 1 D. & L. 274; *Penoyer v. Brace*, 1 Ld. Raym. 245; "as where there is a survivorship." Moore, 367; *Isam's case*, Noy, 150; Carter, 112, 122, 180, 193.

(e) 1 Salk. 319, 320; and 1 Ld. Raym. 245, S. C.; and see 2 Inst. 471, ante, p. 99, n. (b); *Proctor v. Johnson*, 1 Ld. Raym. 669; *Withers v. Harris*, 7 Mod. 68; *Reg. v. Ford et al.* 2 Ld. Raym. 768.

(f) *Penoyer v. Brace*, 1 Ld. Raym. 244; 1 Salk. 320. And see *Howard v. Pitt*, 1 Show. 403. "Every execution ought to follow the record, and the writ must agree with it, otherwise it is illegal, and so are all the books." *Vicars v. Okey*, 2 Keb. 307; Sid. 351;

1 Keb. 92, 123.

(g) 7 M. & W. 206; 8 Dowl. 904.

This was an action against the defendant as the public registered officer of the Imperial Bank of England, and judgment having been obtained against him for the amount sought to be recovered by the plaintiff as such public officer, he was taken in execution for the debt and costs. It appeared that he was also a member of the company. It was moved to discharge him out of custody on the ground that no *scire facias* had issued against him previous to his being taken in execution. And it was held that no *scire facias* was necessary, no facts being shown to the Court that he was not the proper object of execution upon this judgment.

(h) 1 B. & Ad. 704.

took out execution against another member of the company, (an alderman of Dublin, who happened to be in London on some public business,) without first obtaining the leave of the Court to enter a suggestion on the record. The Court on that occasion said that some suggestion ought to be put upon the record in order to make a party liable to the execution who was not a party to the record at the time of the judgment. Since then the proper mode of doing this has been taken more fully into consideration, and the Courts have decided, I think rightly, that it must be by writ of *scire facias*. A suggestion on the record would indeed have the same effect; a *scire facias* does nothing more, and they may both be traversed (i), but the latter is an original and well understood process for the purpose. A *scire facias*, however, is resorted to only for the specific purpose of making the judgment and execution consistent with each other, since otherwise there would be judgment against A. and an execution upon it against B. which would render the record absurd and inconsistent, but the *scire facias* makes the record technically correct, and the party has the opportunity of contesting whether he is really liable to the execution or not." In the same case as reported in Dowl. (k), Parke, B., said, "The Courts have determined, and it is a decision which ought not to be disturbed, that the party against whom it is thus intended to proceed is entitled to have that question, whether he were such or not [i. e. a member for the time being of the public company proceeded against] determined by a jury, and that the course of proceeding for that purpose ought to be by writ of *scire facias*, which would have the effect of showing on the face of the record why execution was issued against a person who was not a party to the judgment."

On the authority of the above case of *Bartlett v. Pentland* (l), it was once thought that in the case of public companies, sued by the name of their public officer, a suggestion on the record of the name of any shareholder of the company was sufficient to render the record consistent in issuing execution against such shareholder, on the judgment obtained against the public officer; Lord Tenterden, C. J., in delivering the judgment of the Court of King's

Formerly a suggestion on the roll thought sufficient, where a new party to the suit.

(i) See *Jordan v. Berwick*, 9 M. & W. 6, as to this; the plaintiff may if he please demur to or traverse a suggestion, but the Courts usually decide the matter on motion to save expense." And see *Barney v. Tubb*, 2 H. Bl. 354; *Jordan v. Strong*, 5 M. & S. 196;

Watson v. Quilter, 1 D. & L. 244, in which last case the whole question of whether a suggestion be traversable or not, and when it is traversable, is reviewed.

(k) 8 Dowl. 906.

(l) 1 B. & Ad. 704.

Bench, saying, "Wherever a person, not a party to the record, is to be affected by the judgment, or wherever the judgment upon the record is to be such, as would not be ordinarily warranted by the previous proceedings on the record, there must be a suggestion made by leave of the Court in the proper form, so as to afford an opportunity to the party to be affected by it, to demur, if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them."

But this decision now overruled by the case of *Bosanquet v. Ransford*

But in the subsequent case of *Bosanquet v. Ransford*, (m), in the same Court, this question was solemnly argued, on a motion by the plaintiff, for leave to enter a suggestion on the judgment roll, (after judgment against the defendant as one of the public officers of the Leamington Bank,) against several parties, shareholders in the said bank. In this case the decision in *Bartlett v. Pentland*, was chiefly relied on as an authority in argument, and the same cases were quoted in support of the mode of proceeding by suggestion, as were relied on in *Bartlett v. Pentland*. The Court however held, that "the case of *Bartlett v. Pentland* has decided that where an Act of Parliament authorizes the making an officer of a copartnership the nominal defendant, but gives power to the plaintiff to take out execution against the co-partners, as being the real defendants, it is necessary to obtain the authority of the Court in some way, before such execution can be had. The question is, as to the mode of obtaining that authority, whether by suggestion, or by *scire facias*, and it depends on this point, whether new parties are to be introduced upon the record. The uniform course, if new parties are introduced, is by *scire facias*; suggestion is applicable only to collateral facts affecting the same parties; as for example, change of name, allowance or disallowance of costs under Acts of Parliament, and similar matters. Now, in the present case, assuming that the nominal defendant is, by the operation of the Act under which he is made defendant, to be considered as the co-partnership, and that they are the real defendants; still it is left uncertain what individuals constitute that copartnership, and the introduction of any person by name as a co-partner, is in effect the introduction of a new person on the record. We think therefore that the proper mode of proceeding, by analogy to all former cases, is by *scire facias*; and that this rule for entering a suggestion must be discharged. Therefore we admit the authority of *Bartlett v. Pentland* as to the principle, which is, that parties are not to be charged without an opportunity of contesting

A suggestion is applicable only to collateral facts.

Scire facias necessary before proceeding against a member of a public company after judgment against the

their liability, but differ as to the mode of proceeding by suggestion, which was not indeed the matter there in dispute. This decision was afterwards affirmed in error in the Exchequer Chamber (x); and the Courts of Exchequer (y) and Common Pleas (z) have established the same principle there laid down, "that a person not party to the record, shall not be affected by it, without a *scire facias*."

In accordance also with the above decision, where there has been a mere nominal change of parties, as in the public officer of a joint-stock company, the real party being the company, a suggestion on the record of such change of the public officer has been held sufficient without *scire facias* (q).

And even where a statute enables a public company "to sue, and to be sued in the name of their secretary," and enacts that every judgment, &c., in any proceedings against such nominal party shall have the like effect upon the property of every shareholder, "as if every individual shareholder had been by name a party to such proceeding;" it has been held that the shareholders could only be charged by *scire facias*, for which motion must be made in Court (r). So in a subsequent case, on motion for a rule calling on a shareholder to show cause why execution should not issue against him, where there was the same provision in the company's Act, rendering each shareholder liable to execution on judgment against the secretary, "as if he had been a party by name to such proceedings"; and cause was shown, and it was contended that a *scire facias* was necessary, the Court held that "the point had been already solemnly decided, therefore the rule must be absolute to issue a *scire facias*" (s).

This part of the question will however be found more fully treated of in the subsequent chapter, on the issuing of this writ in the case of public companies.

Where, however, there are two plaintiffs in a personal action and one of them die after judgment, that shall not put the other to a *scire facias*; nor if one of the defendants die, because the same party still remains on record (t). But in such a case a sug-

registered
officer.

Even where
the compa-
ny's Act
enacts that
it shall not
be neces-
sary.

Scire facias

(x) *Ransford, Pub. Off. v. Bosanquet and others*, 2 Q. B. 972.

(y) *Cross v. Law, Pub. Off.* 6 M. & W. 217; *S. C.* 8 Dowl. 789.

(z) *Whittenbury v. Law*, 6 N. C. 345.

(q) See *post*, p. 104; and see *Webb v. Taylor, Pub. Off.* 1 D. & L. 676;

2 Chitty's Arch. 8th ed. 1397.

(r) *Wingfield v. Burton, Secretary*, 2 Dowl. N. S. 355.

(s) *Clowes v. Bretell*, 2 D. N. S. 528; *S. C.* 10 M. & W. 506; and see 11 M. & W. 461.

(t) *Withers v. Harris*, 7 Mod. 68; Moore, 367; Carth. 112, 193; 1 Show.

not necessary in case of survivorship; suggestion sufficient.

gestion of the death of the party ought to be made on record and then a prayer of execution by or against the survivors (u). So where the plaintiff brought an action against two defendants, and proceeded to outlawry against one and went on with the action against the other, who died after interlocutory and before final judgment, the Court of King's Bench held that he could not have a *scire facias* against his administrator, for, notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant (x).

Scire facias not necessary where a nominal plaintiff or defendant added to the record. A suggestion sufficient.

As to the second branch of the rule, that where the execution is not beneficial or chargeable to a party not named in the record and who subsequently to the judgment becomes a mere nominal plaintiff or defendant, a *scire facias* is not necessary, but a suggestion is in that case sufficient, and the proper course to be pursued; this was so held in *Webb, P. O., v. Taylor* (y), in which case it was moved to set aside a judgment obtained against the defendant and the proceedings thereon, on the ground that the plaintiff, the public officer of the Manchester and Liverpool District Bank, had ceased to be such public officer at the time the judgment was signed. It was proposed to suggest the name of another party as the public officer, on the record; to which it was objected that this would be to introduce a *new party* to the record; but Patteson, J. said:—"It is hard to say that it is a new person proposed to be introduced, because the statute directs that in such a case on the removal of one officer, the action shall go on in the name of another. *The Banking Company are in truth the real parties to the suit.*" And in delivering judgment in the same case, that learned judge

402; *Howard v. Pitt*, 2 V. Wms. Saund. 72 l. n.; 2 Chitty's Arch. 8th ed. 1019; *Cooper v. Norton*, 16 L. J. N. S., Q. B. 364.

(u) *Brace v. Pennoyer*, 5 Mod. 339. "It is true where one is not party to the record as heir, executor, or administrator, he can have no execution without a *scire facias*, though it be within the year, because the alteration of the person alters the process. But it is as true that if two plaintiffs recover and one die before execution the survivor may take it out without a *scire facias*, because he is party and privy to the judgment. So, in *Sackville's case*, Dyer, 175, where in replevin three defendants made cognizance, &c., and a

verdict was given for the plaintiff; one of the defendants died after the last continuance, yet judgment was given against the other two surviving without a *scire facias*." See 8 & 9 Will. III. c. 11, s. 7; and see 2 V. Wms. Saund. 72 k; 2 Chitty's Arch. 8th ed. 1397.

(x) 1 M. & S. 242; 2 Tidd's Prac. 8th ed. 1169; "If a party to an action dies the usual course is to have his death suggested on the record, and the action proceeds with respect to the survivors;" *Cross v. Law*, 6 M. & W. 221.

(y) *Webb, Pub. Off. v. Taylor*, 1 D. & L. 676; and see the case of *Bo-sanquet v. Rausford*, 11 Ad. & E. 520 ante, p. 102.

said:—"I think that Webb being no longer the person who is the public officer of this company, the name of some other public officer ought to be substituted on the record for his." "The substitution of the name of one public officer for that of another ought not to be allowed to be traversed. The real parties are the banking company, and they ought to be allowed to make the substitution which they propose."

The principle which governs these decisions applies in a variety of cases, as in the case of the marriage of a *feme sole*, by or against whom a judgment has been obtained before marriage, and whose husband would be benefited by or liable to the judgment; in the case of bankrupts and insolvents to whom a judgment debt is owing, to enable their assignees, as new parties, to have execution of the judgment; in case of the death of a plaintiff or defendant by or to whom a judgment debt is due, to enable his personal representatives to recover the judgment or to make them liable; against the executors of a deceased judge to compel them to confess the seal of the judge to a bill of exceptions; and the writ is required in several other cases involving the same principle, which will be found treated of at large in the succeeding chapters of this book.

Application
of the rule.

CHAPTER II.

OF SCIRE FACIAS AGAINST MEMBERS OF JOINT-STOCK COMPANIES.

The Rule of Law that the Execution must follow the Judgment, p. 108.

Formerly the Mode of proceeding against Shareholders of Public Companies on a Judgment against the Company was by entering a Suggestion on the Record, p. 109.

Now held that a Suggestion is only applicable to Collateral Facts affecting the same Parties, pp. 113, 116.

The Proceeding against a Shareholder on a Judgment against a Public Company, it is now held, must be by Scire Facias, pp. 113, 146.

Scire Facias may issue at once against Members "for the time being," of a Co-partnership, without Leave of the Court, p. 115.

Leave of the Court required before Scire Facias can be issued against former Members, pp. 115, 123.

Execution may issue against a Public Officer who does not plead that he is not a Member of the Company without any previous Scire Facias, p. 117.

Compulsory under 7 Geo. IV. c. 46, to proceed against Public Officer. Individual Members cannot be sued, pp. 118, 146.

So in Actions by the Company to sue in his Name, pp. 119, 147.

A Public Officer will be presumed to continue such until the Contrary be shown, p. 119.

A Public Officer cannot plead his own personal Bankruptcy in bar of an Action against the Company, p. 119.

Against what Class of Members a Scire Facias must first issue, p. 120.

When Members of Banking Companies primarily and secondarily liable to, and when exempt from the Partnership Debts, pp. 121, 127, 128.

A primâ facie Case must be made out to satisfy the Court that a bonâ fide Attempt has been made to recover the Debt against the existing Shareholders, before a Scire Facias will be allowed to issue against those secondarily liable, pp. 124, 135.

Not necessary that it should issue against all the Shareholders primarily liable, pp. 124, 129.

Meaning of the Words "for the Time being," p. 126.

When Shareholders primarily and when secondarily liable, p. 127.

Enough, if every reasonable and proper Effort has been made to obtain Payment from those primarily liable, p. 128.

Concurrent Writs of Scire Facias may be issued at the same Time

- on the same Judgment against different Shareholders, p. 130.
- The Existence of a Collateral Security which might be made available no reason why a Scire Facias should not issue against Members secondarily liable, p. 134.*
- If a Scire Facias be permitted to go against those secondarily liable they are not concluded thereby, but may plead that all Steps have not been taken against those primarily liable, p. 136.*
- A Plaintiff who has issued Execution against Members of a Joint-stock Company, must go on with it with reasonable Despatch, p. 136.*
- A Member once shown to be such will be presumed to continue one till he proves the Contrary, p. 137.*
- If the Application to the Court to issue a Scire Facias against Shareholders secondarily liable fail, an amended Application may be made, p. 137.*
- Review of the Cases, p. 137.*
- Proceedings against those secondarily liable on Motion after Notice, p. 138.*
- Form of Scire Facias against Shareholder at the time of the Contract, p. 138.*
- When the Liability of former Co-partners ceases, pp. 137, 139.*
- The Scire Facias must state accurately to which Class of Shareholders the Defendant belongs, and must not state him to belong to both, p. 140.*
- The Scire Facias must aver the Debt to be due from the Company, p. 141.*
- Decisions in other Cases not Banking Companies, p. 142.*
- If nominal Defendant collusively suffer Judgment by Default, Shareholders should apply to the Court, p. 142.*
- Defendants cannot plead to the Scire Facias any Defence available in the original Action, pp. 142, 145.*
- Omission to obtain the Leave of the Court to issue Scire Facias when required an Irregularity merely, p. 144.*
- Cases of Exception to this Rule, p. 148.*
- Where Judgment has been signed against a Public Officer on a Warrant of Attorney the Court will direct an Issue to try Matters that might have been pleaded, p. 150.*
- Scire Facias a Nullity, when, p. 151.*
- Scire Facias against Shareholder of Joint-stock Company not necessary, when, p. 151.*
- Execution cannot issue against Shareholder under 7 & 8 Vict. c. 110, on Motion without Ten Days' Notice given, p. 152.*
- If Notice insufficient, Application may be renewed, p. 152.*
- Effect of Joint-stock Companies Winding-up Act, p. 153.*
- Summary, p. 154.*

THE application of the writ of *scire facias* in the case of joint-stock companies in order to render liable the members of such co-partnerships to judgments obtained against such companies and at the same time to enable such members to plead any matter

in discharge of their liabilities when sued either in their corporate name, or in the name of their public officer, is a branch of the law which the rapid growth and increase of joint-stock companies in recent times, has rendered of considerable importance.

By most of the statutes empowering the formation of joint-stock companies, power is given to such companies to sue and be sued "in the name of their public officer for the time being" (a), or in their corporate name (b). In any judgment therefore recovered against such a company, the judgment recovered is, according to the record, against the public officer, when the company is suable in his name or against the company in its corporate name, when it is suable as a corporation, as the case may be; and is not on the face of the record against any individual member or shareholder of such company. The execution therefore warranted by such judgment (without a *scire facias* to make any shareholder a party to the record) is only against the public officer, so far as he may be a member of the company (c) or against the property of the company in its corporate capacity, (unless there be some statutory provision affecting the company to the contrary,) according to the rule of law, that the "execution must follow the judgment" (d), and the judgment and execution must be consistent with each other, otherwise "there would be judgment against A. and an execution upon it against B." (e)

The rule of law that the execution must follow the judgment.

In order therefore to warrant an execution against a shareholder of a joint-stock company (not under the provisions of the 7 & 8 Vict. cc. 110 and 113,) against which or against whose public officer a judgment has been obtained, it seems always to have been thought necessary to make such shareholder a party to the record; either by entering a suggestion on the record that he

(a) Joint-stock Banking Act, 7 Geo. IV. c. 46, s. 9; Joint-stock Companies Act, 4 & 5 Will. IV. c. 94, s. 3; 1 Vict. c. 73, s. 3; and see *ante*, book i. ch. i. p. 7, and generally the private statutes of railway and other companies; *Wingfield v. Barton*, 2 D. N. S. 355; "The Patent Rolling and Compressing Iron Company;" *Clowes v. Brettell*, 2 D. N. S. 528; *S. C.*, 11 M. & W. 461.

(b) 7 & 8 Vict. c. 110, s. 25; 7 & 8 Vict. c. 113, ss. 6, 22, 47; *Carden v. The General Cemetery Company*, 5

Bing. N. C. 258; 7 Sco. 97.

(c) *Harwood v. Law*, 7 M. & W. 203.

(d) *Buxton and another v. Mardin*, 1 T. R. 80. *Per* Buller, J., "A special execution cannot be taken out on a general judgment." * * * "The execution must follow the judgment," *Penoyer v. Brace*, 1 Ld. Raym. 244; 1 Salk. 320; *Howard v. Pitt*, 1 Show. 403; *ante*, book ii. ch. i. p. 100.

(e) *Harwood v. Law*, 7 M. & W. 206, *per* Abinger, C. B.

was such shareholder, or by issuing a writ of *scire facias* against him reciting the judgment, in order to make the record consistent with itself and technically correct.

The first prominent case in the books in which this question was raised, is the case of *Bartlett v. Pentland* (f), in which it was held by the Court of King's Bench, that a suggestion by leave of the Court ought to be entered on the roll in order to make a shareholder of an assurance company liable to a judgment obtained against its secretary. In that case a writ of *ca. sa.* was sued out against a shareholder of the company, and he was arrested upon it without any suggestion being entered on the roll, and without his being made a party to the record by *scire facias*; and the question was raised on motion to set aside this execution on the ground that it was not warranted by the judgment, without its having been first by leave of the Court suggested on the record that the shareholder was a member of that company: and in delivering the judgment of the Court, Lord Tenterden said:—"Unless there be such a suggestion, the execution is not warranted by the judgment, for a judgment against A. will not warrant an execution against B. As there must therefore be facts suggested on the record by leave of the Court to warrant a judgment different from that which the Court would in an ordinary case pronounce, so facts must be suggested to warrant an execution against a person not a party to the record." And in the conclusion of the judgment the Court said, "Wherever a person not a party to the record is to be affected by the judgment, or wherever the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, there must be a *suggestion made by leave of the Court*, in the proper form, so as to afford an opportunity to the party to be affected by it, to demur if he thinks the facts suggested are insufficient in point of law, or to plead if he means to deny them."

This decision appears to have been grounded on the cases of *Hickman v. Colley* (g), *Barney v. Tubb* (h), and *Rex v. Poland* (i),

(f) 1 B. & Ad. 704.

(g) 2 Stra. 1120. In this case a citizen of London suing another out of the jurisdiction and not recovering 40s. he became liable to the costs of the defendant under the 3 Jac. I. c. 15, and the Court gave the defendant leave to suggest the fact on the record as the only way to get his costs.

(h) H. Bl. 350. Where the plaintiff did not recover 40s. and thereby became liable to the costs of the defendant under the Southwark Court of Requests Act, and it was held that the proper course for the defendant was to enter a suggestion of the facts on the record in order to obtain his costs.

(i) 1 Stra. 49. Where treble costs

Formerly the mode of proceeding against shareholders of public companies on a judgment against the company was by entering a suggestion on the record that they were such shareholders.

quoted in the argument, in none of which, however, was a *a new party to the record* sought to be affected by the judgment, but in all of which some collateral facts affecting *the same parties*, were suggested in order to warrant costs which would not ordinarily follow the judgment. This distinction was not taken in the case of *Bartlett v. Pentland*; but in the subsequent case of *Bosanquet v. Ransford* (*k*) this point was raised and determined.

The case of *Bosanquet v. Ransford* arose on the construction of the Banking Copartnerships Act, the statute 7 Geo. IV. c. 46, ss. 9, 12 and 13 (*l*). The 9th section of this Act enables all actions and suits, &c., by or against any banking copartnership established under the provisions of this Act, for recovering any debts, &c., due to or by such co-partnership, to be commenced or instituted and prosecuted in the name of any one of the public officers nominated for the time being of such co-partnership, as the nominal plaintiff or defendant (*m*). Section 12 enacts, that

were to be recovered against a prosecutor for a matter not appearing on the *postea*, and the Court directed that the special matter should be suggested on the roll.

(*k*) 11 A. & E. 520.

(*l*) Intituled "An Act for the better Regulating of Co-partnerships of certain Bankers in England," &c.

(*m*) The following is the section :—

"And be it further enacted, That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons who may be at any time indebted to any such co-partnership carrying on business under the provisions of this Act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such co-partnership against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for recovering any debts or enforcing any claims or demands due to such co-partnership, or for any other matter relating to the concerns of such co-

partnership, shall, and lawfully may, from and after the passing of this Act, be commenced or instituted, and prosecuted in the name of any one of the public officers nominated as aforesaid, for the time being of such co-partnership as the nominal plaintiff or petitioner for and on behalf of such co-partnership, and that all actions or suits, and proceedings at law or in equity to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise against such co-partnership, shall and lawfully may be commenced, instituted, and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal defendant for and on behalf of such co-partnership," [after a similar provision respecting "all indictments, informations, and prosecutions," the section proceeds,] "and the death, resignation, removal, or any act of such public officer shall not abate or prejudice any such action, suit, indictment, prosecution, information, or other proceedings commenced against,

every judgment recovered in any action, &c., against any public officer of any such co-partnership, shall have the like effect and operation upon and against the property of such co-partnership, and upon and against the property of every member thereof, as if such judgment had been recovered against such co-partnership and every member thereof, and the capital stock and effects of such co-partnership, and "*the effects of every member of such co-partnership*," shall in all cases "be attached and attachable," and be in all cases liable to the lawful claims and demands of the creditors of such co-partnership, notwithstanding the bankruptcy or insolvency of such public officer (a).

The 13th section provides that execution upon any judgment in any action by or against any public officer may be issued against any member "for the time being" of such co-partnership; and in case such execution shall be ineffectual, execution may then issue against any person or persons who was or were a member or members of such co-partnership "at the time when the contract in which such judgment was obtained was entered into;" or who has "become a member at any time before such contracts or engagements were executed, or who was a member at the *time of the judgment obtained*;" provided that the last-mentioned execution shall not be issued without leave first granted on motion in open court

or by, or on behalf of such co-partnership, but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such co-partnership for the time being."

(a) The following is the section:—
12. "And be it further enacted, that all and every judgment and judgments, decree or decrees, which shall at any time after the passing of this Act be had or recovered, or entered up as aforesaid, in any action, suit, or proceedings in law or equity, against any public officer of any such co-partnership, shall have the like effect and operation upon and against the property of such co-partnership, and upon and against the property of every such member thereof as aforesaid, as if such judgment or judgments had been recovered or obtained against such co-partnership; and that the bankruptcy, in-

solveny, or stopping payment of any such public officer for the time being of such co-partnership in his individual character or capacity, shall not be nor be construed to be the bankruptcy, insolvency, or stopping payment of such co-partnership, and that such co-partnership and every member thereof, and the capital, stock, and effects of such co-partnership, and the effects of every member of such co-partnership, shall in all cases, notwithstanding the bankruptcy, insolvency, or stopping payment of any such public officer, be attached and attachable, and be in all respects liable to the lawful claims and demands of the creditor and creditors of such co-partnership, or of any member or members thereof, as if no such bankruptcy, insolvency, or stopping payment of such public officer of such co-partnership had happened or taken place."

by the Court in which such judgment was obtained, and on notice, when such motion shall be made, to the person sought to be charged; such execution not to issue after the expiration of three years next after such person has ceased to be a member of such co-partnership (o).

Upon these sections of this statute, there have been numerous decisions on different points raised in their construction, which will be noticed in their order.

In the case of *Bosanquet v. Ransford* (p), it was sought to make one Barker and others shareholders in the Leamington Bank, liable to a judgment obtained against its public officer, under the above sections of the 7 Geo. IV. c. 46; and guided by the decision in *Bartlett v. Pentland* (q), it was sought to do this by a suggestion on the judgment roll by leave of the Court, on affidavit that Barker and the other shareholders were returned to the Stamp Office (under the 6th section of the statute) as such shareholders in the bank.

In the argument on this case, the decision in *Bartlett v. Pentland* was mainly relied on, and the cases quoted in the argu-

(o) "The following is the sect. 13 : —" And be it further enacted, That execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or co-partnership, and that in case any such execution against any member or members for the time being of any such corporation or co-partnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements in which such judgment

may have been obtained, was or were entered into or become a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained : Provided always that no such execution as last mentioned shall be issued without leave first granted on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership."

(p) 11 Ad. & E. 520. The same point was at this time in consideration in the Court of Exchequer in the case of *Cross v. Law*, 6 M. & W. 217; and in the Court of Common Pleas in the case of *Whittenbury v. Law*, 6 N. C. 345.

(q) 1 B. & Ad. 704; and see *ante*, p. 109.

ment on that case were also referred to in this. Lord Denman, C. J., in delivering the judgment of the Court, said, "The case of *Bartlett v. Pentland* has decided that where an Act of Parliament authorizes the making an officer of a co-partnership the nominal defendant, but gives power to the plaintiff to take out execution against the co-partners as being the real defendants, it is necessary to obtain the authority of the Court in some way before such execution can be had. The question is, as to the mode of obtaining that authority, whether by suggestion or by *scire facias*; and it depends on this point whether new parties are to be introduced upon the record. The uniform course, if new parties are introduced, is by *scire facias*: *suggestion is applicable only to collateral facts affecting the same parties*; as, for example, change of name, allowance or disallowance of costs under Acts of Parliament, and similar matters. Now in the present case, assuming that the nominal defendant is, by the operation of the Act under which he is made defendant, to be considered as the co-partnership, and that they are the real defendants, still it is left uncertain what individuals constitute that co-partnership; and the introduction of any person by name as a co-partner is in effect the introduction of a new person on the record. We think, therefore, that the proper mode of proceeding, by analogy to all former cases, is by *scire facias*, and that this rule for entering a suggestion must be discharged. Therefore, we admit the authority of *Bartlett v. Pentland* as to the principle, which is that parties are not to be charged without an opportunity of contesting their liability, but differ as to the mode of proceeding by suggestion, which was not indeed the matter there in dispute."

Now held that entering a suggestion on the record is applicable only to collateral facts affecting the same parties.

The introduction of any person by name on the record, as a co-partner, is in effect the introduction of a new person on the record, and the proper mode of proceeding against him is by *scire facias*.

In the same Term (Trin. Term, 1840) the case of *Cross v. Law* (r) was heard in the Court of Exchequer. In that case the same question arose on showing cause against a rule calling upon one Arrowsmith and ten other persons to show cause why a suggestion should not be entered on the roll against them, as shareholders in the Imperial Bank of England, for the damages and costs in an action in which judgment had been obtained against the defendant as the public officer of that Bank, and why execution should not issue against them or any of them for the same; it appearing from affidavits that the persons mentioned in the rule were members of the banking co-partnership at the time of obtaining the judgment. As in the last case, of *Bosanquet v. Ransford*, it was sought to make these shareholders liable under

the 18th section of the 7 Geo. IV. c. 46 (s), and to proceed against them by entering a suggestion of their partnership on the judgment roll, by leave of the Court, under the authority of the case of *Bartlett v. Pentland*.

In argument, the cases of *Bartlett v. Pentland* (t), *Penoyer v. Brace* (u), *Buxton v. Mardin* (x), and *Hickman v. Colley* (y), were relied on, and the Court took time to consider its judgment.

On an intimation by counsel at a future day, that the Court of Queen's Bench had given its judgment in the case of *Bosanquet v. Ransford* in favour of proceeding by *scire facias*, Lord Abinger, C. B., in delivering judgment, said, "Such was the inclination of our opinions. I thought, on looking at the Act of Parliament, without reference to any other matter, that it was implied that the Court must make some order for the purpose of ascertaining who were the proper parties against whom to put the judgment in execution; and it occurred to me that the Court had authority to make such an order. It appears to me however to be possible, without the violation of any rule of law, to adopt the proceeding by *scire facias*, and which would seem to be the one most appropriate for such an occasion. We think this case is of too much importance for us to put any construction on the Act of Parliament, by which parties who might wish to take the opinions of all the judges would be prevented from doing so. It is true, these joint-stock banks place the public in a very disadvantageous position; for it now appears that in these cases there must, or probably will, be a trial of two actions instead of one: first, in order to establish the claim of the creditor against the company, &c.; and secondly, to fix the particular individual liable to execution. However, *I do not see how we can adopt any other course than that which the Court of Queen's Bench, on consideration, has taken*; and I think we justly may by a very proper analogy to other cases of proceedings by *scire facias*, apply those proceedings to the present case. The rule is, *wherever you seek to fix one party on a judgment given against another, it must be done by scire facias*; and I think that is a principle which applies to the case of a public officer, who is merely the representative of the parties sought to be charged. It appears to me, and I believe that is the opinion of the Court, that the construction of the 18th clause of the statute must be taken to be this:—that the party who wishes to proceed upon the judgment against one of the members of the company

(s) *Ante*, p. 112.

(x) 1 T. R. 80.

(t) 1 B. & Ad. 704; *ante*, p. 109.

(y) 2 Stra. 1120; *ante*, p. 109.

(u) 1 Ld. Raym. 244; 1 Salk. 320. n. (g).

not on the record, if he be a member at the time of the judgment and execution, would have a right to his *scire facias* without an application to the Court; but if the members against whom he should sue out execution should *prove to be insolvent*, he may then apply to the Court, so as to fix the original members at the time the contract was made, and make them still liable; in that case, he must come to the Court to have his *scire facias*."

Alderson, B.—It is proper that the Court should see that there has been a *bond fide* attempt made to fix all the members of the company for the time being, before any execution be allowed to go against members not in that condition.—Rule discharged."

This case therefore affirmed the principle laid down in *Bosquet v. Rangford*, in the Q. B., that the proper course to make a member of a banking co-partnership liable to a judgment against the public officer of the co-partnership is by *scire facias*, and not by suggestion; and it also decided, in construing the 13th sect. of the Act, that as against members of such a co-partnership "at the time of the judgment and execution" (z) a plaintiff has a right to his *scire facias* without an application to the Court; but as against original members, at the time when the contract was made, as a distinct class, a plaintiff can only issue a *scire facias* to make them liable by leave of the Court, and he must satisfy the Court that he has failed in a *bond fide* attempt to obtain the fruits of his judgment "against all the members of the company for the time being," before such leave will be granted;—a decision which has since been considerably modified (x).

In the same term, also in the Court of Common Pleas (Trinity Term, 1840), this question was raised, in the case of *Whittenbury v. Law* (a), on precisely the same grounds. In that case the plaintiff, having recovered judgment against the defendant as the public officer of the Imperial Bank of England, carrying on the business of banking under the provisions of the statute of 7 Geo. IV. c. 46, obtained a rule calling on certain persons therein named to show cause why he should not have leave to enter a suggestion on the roll, that they were before and at the date of the judgment partners in the said company, and why execution should not issue against them on such judgment.

As in the two preceding cases, the decision in the case of *Bartlett v. Pentland* was relied on, and the same cases were quoted in argument; and Tindal, C. J., in referring to the judgment of the Court, in *Bartlett v. Pentland*, said:—"In that

(z) See *post*, p. 120, 126; and the *Greaves*, 10 M. & W. 711.
judgment of Parke, B., in *Steward v.* (a) 6 Bing. N. C. 345.

case, however, the substantial question was, whether, to prevent an incongruity upon the record, the character of new parties to be made liable to the execution must not in some way be made to appear thereon. It was no matter of consideration whether it ought to be made to appear by suggestion, or by *scire facias*.

"The latter point has since been fully considered, both in the Court of Queen's Bench, in the case of *Bosanquet v. Ransford*, and in the Court of Exchequer, in the case of *Cross v. Law*, and in several other cases; and both Courts have concurred in the opinion, that the proper course of proceeding under these circumstances is by *scire facias*, not by suggestion. In the opinion pronounced by those Courts we agree, and are therefore of opinion that the present rule must be discharged."

After this unanimous expression of opinion in all the Courts the case of *Bosanquet v. Ransford* was removed by writ of error into the Exchequer Chamber (b), when the Court of Error affirmed the decision of the Court below, expressing the opinion in its judgment that it had no doubt upon the point. The Court proceeded—"And this decision is consistent with the general rule, that a person not party to the record *shall not be affected by it without a scire facias*."

As to the necessity for a *scire facias* in order to render the members of a banking co-partnership, under the 7 Geo. IV. c. 46, liable to a judgment obtained against its public officer, all doubt is now therefore removed.

Proceeding by suggestion only applicable to collateral facts affecting the same parties.

The case of *Bosanquet v. Ransford* (c) is also an authority as to another point, that "a proceeding by suggestion is applicable only to collateral facts affecting the same parties; as, for example, change of name, allowance or disallowance of costs under Acts of Parliament, and similar matters" (d). So it has been decided in accordance with this authority in the case of *Webb, P. O. v. Taylor* (e), which was an action brought by the public officer of the Manchester and Liverpool District Bank, pursuant to the provisions of the 7 Geo. IV. c. 46, and in which, in order to stay proceedings, the defendant gave a cognovit to the plaintiff, on which judgment was afterwards signed, after the nominal plaintiff had ceased to be the public officer of the company; that the name of the successor of the plaintiff was rightly *suggested* on the record;

(b) *Ransford v. Bosanquet*, 2 Q. B. 972.

(c) 11 Ad. & E. 520.

(d) As to proceeding by suggestion,

and when it is traversable, see *Watson v. Quilter*, 1 D. & L. 244; and see *ante*, ch. i. book ii. p. 102.

(e) 1 D. & L. 676.

that he was not a *new party* to the suit, requiring a *scire facias* to enable him as nominal plaintiff to proceed with the action; Patteson, J., in delivering judgment, saying, "The real parties were the banking company, and they ought to be allowed to make the substitution which they proposed; and such substitution ought not to be allowed to be traversed" (*f*).

But it has since been held, in *Barnewall, P. O. v. Sutherland (g)*, that a memorandum of the death of the nominal plaintiff (the public officer), and of the substitution of another public officer in his stead, entered on the *nisi prius* record after issue was joined without any authority from the Courts, and without giving the defendants an opportunity to traverse the facts stated, or alleging any matter excluding the defendant's right to traverse the facts, was irregular; and a rule for setting aside the verdict in the cause, and for a new trial, was made absolute.

Where judgment has been obtained against the public officer of a banking company, under the provisions of the 7 Geo. IV. c. 46, unless he allege by pleading (or it would seem by affidavit after judgment, if proceeded against,) that he was not a member of the co-partnership, although only nominally the defendant, he may have execution issued against him without any *scire facias*. This was decided in the case of *Harwood v. Law, P. O. (h)*, in which it was held that as the defendant neither stated that he was not a member of the company, nor alleged any other facts to show to the Court that he was not the proper object of execution upon the judgment, the necessity for a *scire facias* did not seem to arise. "When the Courts direct a *scire facias* to issue, it is only with the view of rendering their own records consistent." In this case execution against the defendant would be warranted by the judgment on the record (*i*).

(*f*) See *ante*, book ii. ch. i. p. 104.

(*g*) 1 Lownd. Max. and Poll. 159.

(*h*) 7 M. & W. 203; 8 Dowl. 899, S. C. This was an action against the defendant as the public registered officer of the Imperial Bank of England; and judgment having been signed for the plaintiff for the amount of the damages and costs, execution was issued thereon against the defendant, under which he was arrested. A rule was obtained calling on the plaintiff to show cause why the execution should not be set aside and the defendant be

discharged out of custody, on the ground that the execution could not issue without a previous *scire facias*. The defendant did not, in his affidavit in support of the rule, deny that he was a member of the company. Held, that in such a case no *scire facias* was necessary. And see *ante*, book ii. ch. i. p. 100.

(*i*) In the case of some companies established under Acts of Parliament, the public officer, or nominal defendant, is expressly exempt from personal liability. See *Wormwell v. Hailstone*, 6

Execution may issue against a public officer on judgment obtained against him, without any *scire facias*, unless he has pleaded that he was not a member of the co-partnership.

Compulsory under the 7 Geo. IV. c. 46, to proceed against the public officer of a banking company. Individual members cannot be sued.

It has been also decided in the Court of Exchequer, in the case of *Steward, P. O. v. Greaves and others* (k), that in all actions against banking co-partnerships, established under the 7 Geo. IV. c. 46, it is compulsory under the 9th section (l) of the statute to proceed in the first instance against the public officer of such a company, (at least where it appears that there is a public officer, and that he is within the jurisdiction,) and not against the individual shareholders. Mr. Baron Parke, in delivering the judgment of the Court, stating that all the judges of the Court were of opinion, "that the creditors of a company so established, and having a public officer, have no remedy against the individual members as at common law;" and that the Court was of this opinion,

Bing. 668; *Cane v. Chapman*, 5 Ad. & E. 661; *Corpe v. Glyn*, 3 B. & Ad. 801; *Harrison v. Timmins*, 4 M. & W. 510; *S. C.*, 7 Dowl. 28.

(k) 10 M. & W. 711; *S. C.*, 2 Dowl. N. S. 485. In this case an action of assumpsit, for money lent, &c., was brought by the plaintiff as the public officer of the East of England Bank against the defendants as partners in the Southern District Banking Company. The defendants pleaded that they were such partners; that the banking company was established under the 7 Geo. IV. c. 46; that the causes of action accrued against them as such members of the said company; and that public officers of the company had been appointed and registered pursuant to the statute, and were living within the jurisdiction of the Court. This plea was demurred to, and was held a good answer to the action.

(l) See the sect. *in extenso*, ante, p. 110, n. (m). In *Blewitt v. Gordon*, 1 Dowl. N. S. 815, which was an action brought against a proprietor and member of the Monmouthshire Iron and Coal Company, established under a local and personal Act, (the 3 & 4 Vict. c. 26,) the first section of which enacted, that "all actions, suits, and other proceedings, to be commenced, instituted, or prosecuted against the

said company, shall and lawfully may be commenced, instituted, and prosecuted against the secretary for the time being," in terms similar to the 9th sect. of the 7 Geo. IV. c. 46. A plea was pleaded by the defendant (who was under terms to plead issuably), that he was a member of the co-partnership, and had never been either a secretary or director of the company. Judgment was signed as for want of a plea and a rule was obtained to set aside the judgment, when the same point as that raised in the text was argued. Other sections of the Act under which the company was formed, however, directly retained the individual responsibility of the shareholders, and provided for the case of their being individually sued, that they should obtain contribution from the other shareholders; and Coleridge, J., under the provisions of the particular statute, held that it was not imperative upon the plaintiff to sue the secretary of the company as the nominal defendant; and that the plea not going to the merits was not an issuable plea. This case, therefore, goes no further than being a decision upon this particular statute affecting the members of the co-partnership formed under it, and does not in any way affect the principle developed in the text.

"upon the words of the 9th section giving the remedy against the public officers, and upon the whole purview of the Act."

So, also, in actions by a banking co-partnership, under the 7 Geo. IV. c. 46, it has been held that such a company cannot sue the subscribers for calls in the names of the persons with whom the covenant to pay them, contained in the deed of settlement, was entered into, but must bring the action in the name of their public officer, under section 9 of the statute; the provision in that section, that all actions shall and lawfully *may* be brought in the name of the public officer, being obligatory, and not permissive only (m), Mr. Baron Parke, in delivering judgment, saying "The words of the 9th section of the statute, 'shall and lawfully may,' are in their ordinary import obligatory, and ought, as was said in *Wells v. Sutherland* (m), to have that construction, according to the established rules, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intention of the legislature to be collected from other parts of the Act." "We see no reason, therefore, for construing these words, which are *prima facie* obligatory, in any other than their usual sense."

So compulsory in actions by the company to sue in the name of their public officer.

The return filed at the Stamp Office, pursuant to the 4th section of the Act, is sufficient evidence of the person therein named as the public officer of the company acting as such public officer; and "a party once proved to have been chosen public officer will be presumed to continue such until the contrary is shown" (n). But a defendant must properly raise the point on the record by plea, in order to contend that a plaintiff should have sued as public officer (o). The Courts will not allow a party sued as a public officer to plead his own personal bankruptcy in bar of an action in which he is sued merely as the representative of a company. Such a plea would be bad, inasmuch as the action is on the face of it against the co-partnership, and the defendant is a mere parliamentary defendant; it is impossible that his bankruptcy can be a good plea to the whole action. The Act of Parliament makes him the sole defendant as the representative perhaps of several hundreds; and if he is at liberty to plead a matter merely personal to himself in bar of such an action, he confers the benefit of that defence on all those whom he represents as

A public officer will be presumed to continue such until the contrary is shown.

A public officer will not be allowed to plead his own personal bankruptcy in bar of an action against the company.

(m) *Chapman and others v. Melvain*, 1 Lownd. Max. & Poll. 209; and see *Wells v. Sutherland*, 18 L. J., Exch. 450; 4 Exch. 211, S. C.; and see *post*, p. 147.

1 D. & L. 642; S. C., 11 M. & W. 63; and see *Bosanquet v. Shortridge*, 19 L. J., N. S., Exch. 221.

(o) *Robertson v. Steward and another*, 1 M. & G. 511.

(n) *Steward, P. O. v. Dunn, P. O.*,

defendant; a benefit which certainly the legislature never intended they should have (*p*). But such a plea may be pleaded only so far as the defendant is concerned (*q*).

The Court will not allow the public officer of a banking company, sued as such, to plead that he had ceased to be a public officer before the action was commenced, without an affidavit of its truth (*r*).

Against
what class
of members
the *scire
facias* must
first issue.

When judgment has been obtained against the public officer of a banking co-partnership, established under the provisions of the 7 Geo. IV. c. 46, which it is intended to put in force against the members of the co-partnership, the questions then arise under the 13th section of the Act (*s*), against *what class of members* the *scire facias* shall first issue, and in *what manner* it may and must issue against that class before the residue of the members of the co-partnership are made liable to the judgment; and secondly, in what manner it may and must issue against such residue of the members of the co-partnership, and when they cease to be liable. The construction of this section of the Act was attended with a good deal of difficulty, and the Courts were in the first instance by no means clear and unanimous in their decisions respecting it (*t*). In the case of *Steward v. Greaves* (*u*), Mr. Baron Parke, in delivering the judgment of the Court, gave an exposition of the remedies provided by the Act against members of banking co-partnerships within its provisions, against whose public officers judgments had been obtained, as contra-distinguished to the remedies given by the common law against partners: and the construction in that case, put upon the 13th section of the Act, has been adopted by the other Courts. "It is clear," (the judgment proceeds, after disposing of the point raised in the case that individual members of such a company cannot be sued, but that the proceeding must be against the public officer,) "from the recital in the Act, and the scope of most of its provisions, that the legislature intended to give to corporations, and to co-partnerships of more than six, within the limits therein mentioned, the power of being banks of issue, the Bank of England waiving its exclusive privilege in their favour, *on the condition that the individuals should be liable for the bills and notes*

(*p*) *Steward v. Dunn, ubi sup., per Abinger, C. J.*, 11 M. & W. 65; and 7 Jur. 178.

(*q*) *Wood v. Marston*, 7 M. & W. 865.

(*r*) *Ibid.*

(*s*) See *ante*, p. 112, n. (*o*).

(*t*) See the judgments of Parke, B., and Rolfe, B., in *Harwood v. Law*, 7 M. & W. 208, 210; and of Abinger, Lord, C. B., in *Cross v. Law*, 6 M. & W. 217; *ante*, p. 113.

(*u*) 10 M. & W. 711; *ante*, p. 118, n. (*k*).

issued, or money borrowed, by such corporations or companies in the qualified mode pointed out by the Act. This liability by the common law would not attach at all to individual members of corporations, and would attach in a different mode from that provided for by the statute to members of companies: for at common law those members only would be liable who were such when the contract was entered into, but by the statute, not only those, but all who became members afterwards, and until the bills, notes, or debts were paid, are made liable. At common law, all the goods of the contracting parties and their persons would be liable to immediate execution; by the statute, *the goods of the company are liable, and the members for the time being at the period of the execution* IN THE FIRST INSTANCE; and afterwards those who were so at the time of the contracts being entered into or carried into effect, or when the judgment was obtained thereon. In a proceeding against individuals, they would be liable to simple-contract debts for six years, to specialties for twenty; in the statutory mode of proceeding, the members *who have ceased to be such for three years* are exempt from debts of every description."

When members of banking co-partnerships primarily and secondarily liable to, and when exempt from the partnership debts.

In the case of *Rickets and others v. Bowhay, executrix, and others* (x), Lord Chief Justice Wilde, in delivering his judgment in the Court of Common Pleas, has placed the same con-

(x) 3 Com. Bench Rep. 889. In this case judgment was obtained by the plaintiffs against one of the registered public officers of the Western District Banking Company for Devon and Cornwall, and a *scire facias* was issued, pursuant to the 7 Geo. IV. c. 46, s. 13, in order to obtain execution against the defendants. A rule was obtained for setting aside the *scire facias* and all subsequent proceedings. It appeared, from the declaration on the *scire facias*, that the defendants belonged to the class of shareholders secondarily liable under the 13th sect., which requires the leave of the Court and notice to the defendants before the writ of *scire facias* can be issued against them, and the writ had been issued without either such leave or notice. Held, that this issuing of the writ without leave of the Court was an irregularity merely, to be taken

advantage of by motion, and that it was waived by pleading over. Held, also, that the absence of notice of a proceeding requiring notice is an objection of substance, and not of mere form. The declaration varied from the writ, and was so ambiguous in its form that it was doubtful in which class of shareholders the defendants were placed. The writ stated that they were members of the co-partnership "at the time of the judgment," and "at the time being." The declaration charged the defendants as executrix and administrators of deceased members of the co-partnership, and not as members of the co-partnership at all. Held, that this was a species of fraud on the statute and on the Court, and the rule was made absolute for setting aside the *scire facias*, the declaration, and all the subsequent proceedings.

struction upon the 18th section of the Act. That learned judge is reported to have said, "The remedies given by the Act to persons who have contracted with a joint-stock banking company are to be pursued against the public officer. A judgment obtained against him is to enure to the effect of giving a right to have execution against different classes of persons upon different conditions. The 13th section enacts, "that execution upon any judgment in any action obtained against any public officer, for the time being, of any such corporation or co-partnership carrying on the business of banking under the provisions of the Act, whether as plaintiff or defendant, may be issued against *any member or members, for the time being*, of such corporation or co-partnership; and that, in case any such execution against any member or members, for the time being, of any such corporation or co-partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment," upon that condition, and in that case, "it shall be lawful for the party or parties so having obtained judgment against such public officer, for the time being, to issue execution against *any person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements, on which such judgment may have been obtained, was or were entered into, or became a member or members at any time before such contracts or engagements were executed,*" (thus rendering liable persons who would not have been liable at common law,) "or *was a member at the time of the judgment obtained,*" without regard to whether they were partners at the time the contracts were entered into or executed. The clause, having given this extraordinary remedy, then proceeds to enact, that "no such execution as *last mentioned* shall be issued without leave first granted, on motion in open Court, by the Court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, *nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership.*" Under these circumstances, it is obvious that it may not always be very easy to apply to cases arising upon this Act the ordinary rules of law. The legislature has sought to make the remedy co-extensive with the inconvenience intended to be obviated; and accordingly *the leave of the Court* is, in certain cases, to be obtained before execution can be issued, and notice is to be given to the party sought to be charged. *What notice shall be given must, of course, be decided by the Court.* When the parties are before it, the Court will

inquire within which of the three classes, described in the 18th section, the persons against whom execution is prayed fall. Further, the Court is charged with the duty of ascertaining that *the execution against members of the first class has been ineffectual before recourse is had to the second and third*; that is, that *all due means* have been taken to obtain satisfaction against the parties primarily liable before execution is allowed to go against those whose liability only arises on their default.

In the same case, Mr. Justice Maule, in giving judgment, thus explains this section:—"The statute gives a different mode of proceeding against parties *who were members at the time of the contract, or of the judgment*, from that which it gives against members *for the time being*. Where a *scire facias* issues against one who is a member for the *time being*, that is, *at the time the writ issues*, no leave of the Court is necessary; but in the other cases, *leave must first be obtained on motion in open Court*, and which motion is to be made on *notice* to the person sought to be charged."

Leave must first be obtained on motion in open Court after notice to the person sought to be charged, before a *scire facias* will be allowed to issue against those secondarily liable.

So, in the Court of Queen's Bench, in the earlier case of *Eardley v. Law*, P. O. (y), Mr. Justice Little Dale, in delivering judgment, says, "The statute 7 Geo. IV. c. 46, s. 13, says, that on judgment being obtained against the registered officer of a company within the Act, execution shall issue against any member or members for the time being. It is not considered right, in the first instance, that persons formerly partners, but who have left the company, should continue always liable. But they are not wholly discharged: for if the debt cannot be levied on those who remain members, the former members may be subjected to execution *by leave of the Court on motion, which motion, it is now settled, in the case of persons not parties to the record, must be for a scire facias*. To ground such an application against those parties, it

(y) 12 Ad. & E. 802. This was an action brought by the plaintiff against the defendant, as the public officer of the Imperial Bank of England, to recover the amount of deposits made by him in the bank. The defendant suffered judgment by default, and execution was issued against him, to which there was a return of *nulla bona*. Without taking further steps against any of the shareholders "for the time being," (there being 131 members of the co-partnership, several of them solvent,) a motion was made for a rule to

show cause why a *scire facias* on the judgment should not issue against two former shareholders of the company: and it was held, that sufficient ground was not shown for a *scire facias* against former members; that, before the Court will allow it to issue, a plaintiff must show that he has made substantial and *bond fide* endeavours to obtain an available execution against the present members; and the Court will decide on the motion whether sufficient diligence has been used in the particular case.

And it must be shown that proper proceedings have been taken against the members primarily liable, before a *scire facias* will be allowed to go against those members who are only liable on their default.

Not necessary that *scire facias* should issue against all the members primarily liable.

must be shown that proper proceedings have been taken against some who are actually members. Here no step has been taken but against the registered officer, who was insolvent; and, as to him, it is not shown that any previous inquiry was made: the sheriff's return of *nulla bona* is considered sufficient. *I do not say that it is necessary to proceed to execution against all* the continuing members; but enough has not been done here; and the rule must therefore be discharged."

In the subsequent case of *Harvey, P. O. v. Scott, P. O. (z)*, in the same Court, it was held to be enough in order to obtain a *scire facias* against former members of a banking copartnership, under stat. 7 Geo. IV. c. 46, ss. 12 and 13, to show that executions after writs of *scire facias* have been issued against several of the existing partners at the time of issuing the writ, that *nulla bona* had been returned, and that after reasonable inquiry had been made as to the solvency of all, there was, on such inquiry, ground for believing that execution would not be effectual against any; and that on this last point a *prima facie* case was sufficient.

In the case of *Field v. M'Kensie (a)*, in the C. P., which was decided about the same period, it was held, Wilde, C. J., *dubitante*, where execution had been issued against several existing members of a banking co-partnership established under the 7 Geo. IV. c. 46, and no satisfaction had been obtained, and grounds were shown for believing that none of the existing members were solvent, that a *scire facias* might issue against persons who were members at the time of the contract being made, although execution had not been issued against *all* the existing members. In delivering the judgment of the Court, Wilde, C. J., is reported to have said (*b*), "The majority of the Court are of opinion that this rule should be made absolute for a *scire facias*. For my own part, I must confess I have considerable doubt; but I entertain too much respect for my learned brothers not to distrust my own individual judgment when opposed by their united and deliberate opinion. And, as it is important for many reasons that the parties should not be delayed, I concur in thinking that the *scire facias* should issue." After referring to a preliminary point, his Lordship proceeded: "The next question is, whether the plaintiff has duly observed all the requisites of the statute, and brought before the Court the necessary materials to satisfy it that reasonable diligence has been used by him to work out satisfaction of the judgment against the members of the

(z) 11 Q. B. 92.

172.

(a) 4 C. B. 705; and 5 D. & L.

(b) 4 C. B. 720.

co-partnership for the time being. It appears that he has issued several writs of *feri facias*, which have been returned *nulla bona*; and this is fortified by the affidavit of the attorney, who swears that he received instructions from the plaintiff to take proceedings against all the members for the time being of the said co-partnership from whom it was probable that any part of the debt and costs could be obtained, without favour or partiality, and that to the best of his judgment and ability he had followed such instructions. The first question is, whether it is necessary, in order to give the plaintiff a *locus standi*, to issue writs of *feri facias* against all the members for the time being; (and I do not apprehend that there can be much difference between issuing execution against one only and issuing it against any number of members short of the whole,) or whether it is enough to do as the plaintiff has here done. I own I have considerable doubt whether the plaintiff is shown to have done enough. The rest of the Court, however, think that sufficient has been done to bring the parties before the Court.

“The next question is, do the facts which are presented to the Court upon the affidavits warrant the belief that the plaintiff has done all he could reasonably be expected to do to work out satisfaction of his judgment against the parties made primarily liable by the statute? The names of all the several parties are given, with the exception of two. As to some, it is shown that writs of *feri facias* have been issued without producing any fruits. As to others, their situation in life is deposed to, with the grounds upon which the deponent rests his belief that any proceeding against them must prove futile. No affidavit is offered in answer, nor is it suggested in answer to this rule—and the fact is much, and very properly, relied on by the counsel who supported the rule—that there is any one individual of the first class from whom there was any reasonable grounds for expecting to obtain satisfaction. That being so, the Court think the plaintiff is entitled to issue his writ of *scire facias*.

“This is a very important part of the case, inasmuch as the opinion of the Court is in all probability conclusive on the parties, as to whether or not due means have been taken to obtain satisfaction of the judgment from the members for the time being. Bearing that in mind, the Court, after a careful consideration of all the facts, have come to the conclusion I have already stated.”

The case of *Dodgson, P. O. v. Scott, P. O. (c)*, in which a most
(c) 2 Exch. Rep. 457; 6 D. & L. 27, S. C.

Meaning of
the words
"for the
time being."

elaborate and masterly judgment was delivered by Mr. Baron Parke, appears to have settled the much vexed question as to the meaning of the words "for the time being" in the 13th sect. of the statute, and as to the class of shareholders primarily liable to execution on a judgment against a public officer. This was an application by the plaintiff, under the 7 Geo. IV. c. 46, s. 13, for permission to issue a *scire facias* against a Mr. Brooke, who was alleged to have been a member of the Newcastle Joint-stock Banking Company (against the public officer of which company a judgment had been recovered) at the time the contract sued upon was entered into by that company with the plaintiff, and on which judgment had been obtained. Two objections were raised to the issuing of the *scire facias*; first, that the plaintiff had not taken the proper steps in the first instance, by issuing a *scire facias* against the proper persons primarily liable; and secondly, that, supposing the plaintiff had done that, then upon the affidavits there was no sufficient case made out for the interference of the Court in granting a *scire facias* against the party to the contract, because other writs of *scire facias* had been sued out against other parties, and that it was yet undetermined that the result of them would be fruitless.

The first and important question in the case was, what class of persons were meant to be designated by the statute under the description of persons "for the time being." "Now it is a good rule to go by," said the learned Baron, in giving his judgment, "in the interpretation of a statute, to act upon its grammatical construction, unless it leads to some incongruity or manifest absurdity. The words of the clause are, 'execution upon any judgment obtained against any public officer, for the time being, of any such corporation or co-partnership carrying on the business of banking under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members, for the time being, of such corporation or co-partnership.' What is the grammatical construction of the words "for the time being"? Surely they mean for the time being of the act with respect to which it is spoken: this must therefore be an execution against the persons who at the time of the execution were members of the banking company." "It is quite impossible, looking at this Act of Parliament, to say that the legislature meant to restrict the creditor to the common-law liability of the debtor; for the statute really made *three other classes of persons* liable, besides those who are liable by the common law. It makes, *in the first place*, those liable, who *were parties at the time of the execution*; and then, in

failure of these, those who were members of such co-partnership *at the time the contract* or agreement on which such judgment was obtained was entered into. This is the common-law liability; but the statute does not confine the remedy to persons who were partners at that time, for it goes on to extend it to those who became members "at any time before such contract was executed;" so that, in the case of executory contracts, those are liable who are partners at the time of *the execution of the contract*, and they were not liable at common law. But, in the next place, it makes those liable who were members "at the time of the judgment obtained;" and these also are not liable at common law. It is therefore perfectly clear that this statute means to impose some additional liability beyond that which the common law imposed on the members of these co-partnerships."—"If that be the correct view, the effect is to make those who are partners *at the time the execution issues* liable; and then, in *the event of an execution against them being unsuccessful*, the remedy is to be taken against those who were partners *at the time of the contract being entered into*; then against those who were so *at the time of the contract being completed*; then against those who were so *at the time of the judgment being obtained*. It is to be observed that the legislature has let slip one class of persons—whether intentionally or not, I do not know—namely, *those who have become partners after the contract was completed, and have ceased to be so before judgment obtained*, although they were partners at the time the action was commenced. That case the legislature did not provide for, and these persons are certainly exempt, for there are no words to embrace them. My opinion therefore is, that in this instance the plaintiff, by taking his remedy by issuing writs of *scire facias* against the existing members of the company—I mean those existing *at the time the scire facias was obtained*—has pursued the proper course, and that he was not bound to take out any *scire facias*, and would have been wrong to have taken out any *scire facias* against those who were partners at the time that the action was commenced (c).

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"I come therefore to the last question, whether or not the plaintiff has entitled himself to the interference of the Court by the steps which he has taken against those different persons who were members for the time being. Now the affidavits state that there are a great number of persons who were partners in this concern, against whom it would be undoubtedly hopeless to take any proceedings. Seven writs of *scire facias* have been issued, which promise a result of about 130*l.* altogether. But then it is said that there are two persons against whom no effectual steps (c) And see *ante*, judgment of Mr. Justice Maule in *Ricketts v. Bowhay*, p. 123.

have been taken in order to make them responsible, and against whom proceedings might be taken with effect. Against one a *scire facias* issued, and it is objected that the present proceeding ought not to be allowed until that writ has come to its determination and been finally disposed of. Now if I am satisfied that that writ would produce no result whatever, or no result worth the expense of proceeding in it, then the pendency of such *scire facias* is no answer to this application; and I take it that the principle of the case of *Field v. McKenzie*, which was referred to as lately decided in the Court of Common Pleas (d), (in which Wilde C. J. seems to have thought at first that you must issue a *scire facias* against every individual member 'for the time being,' before you can apply to the Court for its interference against a person who was a member at the time of the contract made, which opinion was overruled by the rest of the Court,)—

Enough if every reasonable and proper effort made to obtain payment from those primarily liable.

who thought it was enough, if they were satisfied, that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable,—is the rule upon which I think I must act in the present case.

"I think that in this case the plaintiff has done what the majority of the Court of Common Pleas, and ultimately I believe my Lord Chief Justice Wilde, said was necessary in such a case. A similar rule, I think, was previously laid down in the Court of Queen's Bench (see *Eardley v. Law* (e) and *Harvey v. Scott* (f)). The rule is, that *all that is requisite in this case is, that a scire facias should issue against an existing member or members, and that there should be a reasonable certainty that all remedies against that class would be ineffectual*. I am satisfied of this, and therefore the rule must go."

The class of shareholders primarily and secondarily liable; and those who are exempt from liability.

The class of shareholders, therefore, of a banking co-partnership established under the 7 Geo. IV. c. 46, against whom a *scire facias*, on a judgment obtained against the public officer, must first issue, (if the property of the co-partnership be insufficient to pay the debt, and the judgment creditor elect to proceed against the shareholders (g),) is, first, the shareholders *for the time being*, "that is at the time the execution issues" (h); secondly, (in the event of an execution against them being unsuccessful,) against those who were partners at the time of the contract being entered

(d) 16 L. J., C. P. 203; 5 D. & L. 172; 4 C. B. 705; S. C., ante, p. 124.

(e) 12 Ad. & E. 802.

(f) 17 L. J., Q. B. 9.

(g) See sect. 12 of the statute.

(h) *Rickets and others v. Bomhay and others*, 3 C. B. 889; see ante, judgment of Maule, J., in that case, p. 123; and see judgment of Parke, B., in *Bradley v. Byre*, 11 M. & W. 451.

into; thirdly, against those who were so at the time of the contract being completed; and lastly, against those who were so at the time of the judgment being obtained. Whilst those who have become partners after the contract was completed and have ceased to be so before judgment was obtained, (although they were partners at the time the action was commenced,) are exempt from liability altogether, for there are no words in the statute to embrace them (i).

Then as to the manner in which it *may* and *must* issue before the second class of shareholders are liable, the case of *Fowler and others v. Rickerby and others* (k), has decided that the *scire facias* The *scire facias* may issue in the first instance against any member for the time being the plaintiff may select, and need not issue against all. may issue against "any member for the time being of such co-partnership" whom the plaintiff may elect, and that he cannot be compelled by plea in abatement to proceed against all the other co-partners of the same class equally liable, *at the same time*. Lord Chief Justice Tindal, in delivering his judgment in this case, said, "Looking at this statute I think that a plea in abatement was never contemplated. What is the object of the statute? It gives an authority to those who hold the notes of these banking firms, to bring an action against the public officer of the company alone, and having recovered judgment to issue execution 'against any member for the time being of such corporation or co-partnership;' giving a much wider range, therefore, than that which is ordinarily given, where you issue execution against those parties who are parties at the time the contract is entered into, no authority being generally given against those who enter into the partnership after the contract is made, which is the subject matter of the action. But where you find in the very next section (s. 14), that the public officer in whose name the suit was prosecuted, and every person against whom execution upon any judgment obtained, shall be issued, 'shall always be reimbursed

where it was held the words "for the time being," mean *at the time execution is sued out*; and see *Dodgson v. Scott*, 6 D. & L. 39; *Id.* 2 Exch. 468.

(i) *Dodgson v. Scott*, 6 D. & L. 39; *Id.* 2 Exch. 468.

(k) 9 Dowl. P. C. 682. In this case the plaintiffs obtained judgment against one of the public officers for the time being of the Imperial Bank of England, and sought to put in force the said judgment against fifteen share-

holders by issuing a writ of *scire facias* against them reciting the judgment. The declaration founded on the writ was only against twelve of these shareholders, and one of the defendants demurred to the declaration for this cause. It was *held* that the objection of nonjoinder could not be raised upon demurrer, and that a plea in abatement for the nonjoinder of the other members would be bad.

and fully indemnified for all loss, damages, costs, and charges, without any deduction, which such public officer or person may have incurred by reason of such execution, out of the funds of such corporation, or in failure thereof, by contribution from the other members of such co-partnership,'—that shows that there is a full remedy given to these persons without the others being brought in by a plea in abatement. The object of this act is to allow the judgment creditor when he has obtained judgment, to go singly against any one who is responsible, and who is a member of the corporation at the time, and he cannot be compelled, when he has brought one party before the Court by *scire facias*, to proceed against all the others. That is, in effect, the plea in abatement being taken away in the original action, it is also virtually taken away on the *scire facias*."

So Mr. Justice Erskine, in the same case, says, "It appears to me, that an action is given against the public officer of the company to relieve the plaintiff from the necessity of joining all the members of the co-partnership on the record; and although under the 13th section, it is necessary to have a *scire facias* to bring on the record the names of those members of the company whom the plaintiff may select as the objects of his execution, yet it never could have been intended that all those evils should be produced in this stage of the proceedings which it was the object and intention of the legislature to avoid. The Act of Parliament says, that execution may be issued against any member, for the time being, of such company, or against any person who is, or has been a member of the corporation. The object therefore was to give the plaintiff the opportunity of selecting one, two, three, or any number of the members of the company to proceed against."

Concurrent writs of *scire facias* on the same judgment can be issued at the same time against different shareholders.

Whether a plaintiff could issue several concurrent writs of *scire facias* against members of the same class, was at one time questioned. The case of *Fowler v. Rickerby* determined that the plaintiff may join any number of shareholders of the same class in his writ of *scire facias*, and issue execution against any one or more he may select, named in such writ; and if his debt be not satisfied he may then issue a further *scire facias* against other shareholders to recover his debt. But it was doubted whether a plaintiff could issue several concurrent writs of *scire facias* against different shareholders of the same class. This point was argued in the case of *Esdaile and others v. Lund* (1), in which case

(1) 12 M. & W. 607; S. C. 1 D. & L. 565. See also *Esdaile v. Trustwell*, 17 L. J., N. S., Ex. 294; 2 Ex. Rep. 312, S. C.; in which case a writ of *scire facias* was issued against a member of a banking co-partnership, on

to a declaration in *scire facias*, reciting a judgment obtained by the plaintiffs against the public officer of the Yorkshire Agricultural and Commercial Banking Company, and praying execution against the defendant as one of the members of the company, there was a plea in abatement that the plaintiff had issued seven separate writs of *scire facias* against the defendant and six other shareholders, all of which were pending; and, on demurrer to the plea, it was held bad for multiplicity, the defendant having set forth in it six writs, all pending, instead of relying upon one. The Court, in giving judgment, expressly avoided giving any opinion on the point raised; Parke, B., in delivering the judgment of the Court, saying, "We do not wish to be understood to express any opinion on the subject of the construction of the statute. If we had to decide that point the argument might perhaps be found to require some consideration; but on that point we express no opinion." Judgment for the plaintiff of *respondeat ouster*.

This point, however, has been recently raised and decided in the Court of Exchequer in the case of *Burmester v. Cropton (m)*. In this case to a *scire facias* under the 7 Geo. IV. c. 46, s. 13, against a member for the time being of a banking co-partnership, it was held to be no answer that the plaintiff had previously issued another *scire facias*, and obtained judgment thereon against another member for the time being of such co-partnership. In giving judgment in this case, Mr. Baron Parke is reported to have said (n), "It appears to me that we ought to construe the 13th section of the statute on which this case depends, so as to carry into effect the intention of the legislature, which evidently was, that by suing the members of one or more classes in succession the creditor might recover his debt. It is manifest he would not be paid if after execution against one of a particular class who was not able to pay, there was an end of all further execution against any other members of that class. For according to the defendant's argument the plaintiff must then resort to another class, which by the statute he could not do until he had ex-

a judgment against the public officer, and the defendant pleaded in abatement that a concurrent writ had been issued at the same time for the same sum on the same judgment by the same plaintiff, against another member of the co-partnership who was still alive, and that the suit against him was still depending. The affidavit verifying the plea was held not to

be sufficient, the defendant not having sworn "that he believed the causes of action to be the same." The rule which had been obtained for setting aside the judgment signed as for want of a plea was therefore discharged.

(m) 3 Exch. 397; S. C., 6 D. & L. 430.

(n) 3 Exch. 400.

hausted all the members of the previous class. Therefore the effect of putting that construction on the statute would be, that if one member of a class turned out insolvent the plaintiff would have no remedy at all. The statute was evidently framed by some one not conversant with proceedings at the common law, but it is perfectly clear that the legislature meant in one way or another, by making different classes of persons responsible, that the creditor should be paid his debt. It is said to be a hardship that several concurrent writs of execution should issue when perhaps if one had issued in the first instance the debt would have been paid, but it should be recollected that none would have issued unless the creditor was unpaid. If indeed a number of writs issued for the purpose of oppression, the Court would interfere to prevent the abuse of its process, but the mere fact of one writ having issued against a person liable to pay the creditor is no answer to another writ against another shareholder of that class."

In *Nunn v. Lomer* (o) the same question was raised by plea in abatement, which was demurred to. In that case the Court held the plea to be insufficient; Parke, B., in giving the judgment of the Court, saying, "I think our judgment ought to be for the plaintiff. I entertain no doubt whatever on the matter that, according to the true meaning of the Act, the plaintiff is not bound to proceed against one or all of those members, but that he may select any number he pleases. He may have concurrent writs going on at the same time. When the debt is paid an *exoneretur* will be entered" (p).

But it would seem that the plaintiff *must* do more than select one or two of the first class of shareholders against whom he may choose to proceed before he can resort to the class of shareholders secondarily liable under the 13th section of the statute. It will have been seen from the judgment of Mr. Justice Littledale in *Eardley v. Law* (q) that before leave will be granted by the Court to issue a *scire facias* against a co-partner secondarily liable, "it must be shown that proper proceedings have been taken *against some* who are actually members. I do not say that it is necessary to proceed to execution *against all* the continuing members." And in the same case Mr. Justice Coleridge in delivering his judgment says, "The statute distinguishes between the class of persons primarily and the class secondarily liable. The last are to be called upon

(o) 3 Exch. 471.

(p) *Ib.* 475.(q) 12 Ad. & E. 811; *ante*, pp. 123, 128.

only after certain proceedings have been taken against the first. *Something real* must have been done and *bond fide* before a plaintiff can ask for his remedy against the persons secondarily liable; it is sufficient to lay down this *without saying what may be the minimum.*" And in the same case Lord Chief Justice Denman says, "I agree in the opinions of Lord Abinger, C. B., and Alderson, B. which have been cited from *Cross v. Law* (r); the question is whether, according to the construction there adopted, there be sufficient reason for granting a *scire facias* against persons who have ceased to be members of the bank, at what period we do not know. There might be cruel injustice in such a proceeding. If the plaintiff here could have said, 'I have sued those members of the company whom I *bond fide* believed the most solvent,' or 'I have sued only one, but on full inquiry I am satisfied that I could not proceed against another with any chance of success,' *the case would have been very different.*"

According to this decision of the Court of Queen's Bench, therefore, it does not appear *how far* a plaintiff must go (so long as he makes a *bond fide* endeavour to recover the fruits of his judgment from *the class* of creditors primarily liable), before he can obtain leave to issue a *scire facias* against any of the class of members secondarily liable. On referring to the decision of Alderson, B., in the Court of Exchequer, in the same year, in the case of *Cross v. Law*, in which Lord Chief Justice Denman says he agrees (s), we there find that Mr. Baron Alderson, in giving judgment, says, "It is proper that the Court should see that there has been a *bond fide* attempt made to fix ALL the members of the company for the time being, before any execution be allowed to go against members not in that condition." The words of the statute, it will be seen, are "that in case *any such execution* against *any member or members* for the time being of any such corporation or co-partnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party, &c., to issue execution" against the second class of members.

The statute would seem to direct that *any execution* against *any member* or members for the time being, (if the amount of the judgment were not recovered,) would warrant proceedings against the members secondarily liable. The construction of the statute on this point in the earlier cases quoted was subject to much doubt.

(r) 6 M. & W. 223; see *ante*, p. 113.

(s) 6 M. & W. 22; and see *ante*, p. 115.

The Court of Exchequer, in the case of *Cross v. Law* (t), having decided that "the Courts should see that there has been a *bond fide attempt made to fix* ALL the members of a company primarily liable before execution be allowed to go against members secondarily liable." The Court of Queen's Bench, in *Eardley v. Law* (u), deciding that "*something* real and *bond fide* must have been done before a plaintiff can ask for his remedy against the persons secondarily liable, without saying what might be the minimum." And the Court of Common Pleas, deciding in *Ricketts v. Bowhay* (x) that the Court must be satisfied "*that all due means* have been taken to obtain satisfaction against the parties primarily liable before execution is allowed to go against those whose liability only arises on their default." This point has, however, in the recent case of *Field v. M'Kenzie, P. O.* (y), to which we have already referred (z), been expressly raised and settled. Subsequently, in that case, an application was made to the Court, and a rule *nisi* was granted, to set aside the rule (a) on the ground that the affidavits on which it had been granted did not disclose a collateral security which the plaintiffs held, which, by care and management, might be made productive in discharge of the judgment debt. But the Court discharged the rule; Wilde, C. J., in delivering judgment, saying there was no reason why a plaintiff should not proceed with his remedy by *scire facias* against the former members of the company, because there was in existence a certain security which, by care and management, might possibly, at some time or other, be rendered productive.

So, in *Harvey, P. O. v. Scott, P. O.* (b), the same point was raised in the Court of Queen's Bench. The plaintiff was the public officer of the London and Westminster Bank, and recovered judgment in February, 1847, against the defendant as the public officer of the Newcastle-upon-Tyne Joint-stock Banking Company. The Bank had become insolvent, and writs of *scire facias* were issued against ten persons then shareholders, on which writs of *fieri facias* had issued, and had been returned indorsed *nulla bona*. A rule *nisi* was obtained, calling on certain persons secondarily liable to show cause why writs of *scire facias* on the judgment should

The existence of a collateral security which might be made available, no reason why a *scire facias* should not issue against members secondarily liable.

(t) 6 M. & W. 223; *ante*, p. 113.

(u) 12 Ad. & E. 811; *ante*, p. 123.

(x) 3 C. B. 902; *ante*, p. 121.

(y) 16 L. J., N. S., C. P. 203; 5 D. & L. 172.

(z) See *ante*, p. 124.

(a) *Field v. M'Kenzie, P. O.*, 17 L. J., N. S., C. P. 98; 5 D. & L. 348; 4 C. B. 725.

(b) 17 L. J., N. S., Q. B. 9; 11 Q. B. 92; and see *ante*, p. 124.

not issue against them. The affidavits on which the rule was obtained stated, that, from inquiries made, nothing could be obtained from the ten persons against whom the writs had issued, as they were all of them "worth nothing," and that the only other shareholders at the time of issuing the execution were contained in a list annexed and described as "dead," or "worth nothing." That before the judgment was obtained all the shareholders who possessed any property whatever had ceased to be shareholders; that there were no assets of any kind belonging to the bank, and that the only way of recovering the debt was by forcing payment from those who were shareholders at the time the contracts were entered into, and who had since retired from being shareholders. It was decided that a sufficient *prima facie* case had been shown for the *scire facias* to go. In delivering judgment on this case, Coleridge, J., said, "The clause of the statute appears to apply to two bodies of persons, those who were shareholders at the time when the judgment was recovered, and those who were shareholders at the time when the contract was entered into. Now it is a condition precedent to proceeding against the second class, that the judgment must *have been attempted* to be put in force against those of the first class. The statute, without specifying any mode, enables the Court to authorize execution against the second class of persons, and it has been decided that the proper mode is by *scire facias* (c), and we are to decide under what circumstances we will allow the proceeding. We must see that we do not injure either party by granting this power on *insufficient materials*, but if a *prima facie* case is made out the *scire facias* ought to go in order that the matter may be properly sifted." And Wightman, J., in delivering judgment in the same case, says, "It is enough that the plaintiff has *tried to make the judgment available against those who were shareholders at the time when he obtained judgment*, but it is said he has not issued execution against every person to see whether he has assets or not. I think quite enough has been done to show that he has attempted *bond fide* to recover the debt against the existing shareholders."

But a *prima facie* case must be made out to satisfy the court that a *bond fide* attempt has been made to recover the debt against the existing shareholders.

If a *scire facias* improperly issue against a person not secondarily liable as a member of a banking co-partnership, he may plead to the *scire facias* that he was not a partner when the contract was entered into (d). And if all available steps have not

If the

(c) See *ante*, p. 113.

S., Q. B. 12; *per* Wightman, J., 11

(d) *Harvey v. Scott*, 17 L. J., N. Q. B. 108.

court permits a *scire facias* to go against those secondarily liable, they are not concluded thereby, but may plead that all steps have not been taken against those primarily liable.

been taken against the class of shareholders primarily liable, though sufficient has been shown to induce the Court to allow writs of *scire facias* to issue against the shareholders secondarily liable, such shareholders can plead that all steps have not been taken against those of the first class (e); and they are not finally bound by the decision of the Court in allowing the *scire facias* to issue (f).

In *Dodgson v. Scott* (g), this construction was upheld in the Court of Exchequer, Parke, B., holding that "it was enough if the Court were satisfied that every reasonable and proper effort had been made for the purpose of obtaining payment of the debt due to the creditors, by recourse to those who were primarily liable."

In the recent case of *The Bank of England v. Johnson* (h), the decision in *Eardley v. Law* was upheld (i). It was objected to an application for leave to issue a *scire facias* against the members of a joint-stock banking company at the time of the contract, under the 7 Geo. IV. c. 46, that the plaintiff had not made out a sufficient case of *bond fide* efforts to obtain the sum recovered from the members for the time being—the class primarily liable—to justify the Court in ordering a *scire facias* against the class liable in the second degree. It was urged that the Act required the plaintiff to proceed upon his judgment at no particular time: he might wait for many years without losing his remedy, save as against members of the second class, who are not liable after three years from the time of ceasing to be so; and he might then, undoubtedly, proceed against members for the time being, who did not become such until long after the judgment. The Court held, however, "that although the plaintiffs might sue out execution when they pleased, whenever they did so they ought to try to make it effectual against all the members for the time being. Although the statute did not confine them to one execution, but they might have several against several members, it did not authorize them to select one and lie by and then begin again; but if they began their execution they ought to go on with it with reasonable despatch."

A plaintiff who has issued execution against members of a joint-stock company must go on with it with reasonable despatch.

A member once shown to have been a

A member of such a co-partnership, once shown to have been a member, will be presumed to continue a member until he is proved

(e) *Harvey v. Scott*, *ib. per Erle, J.* *ante*, p. 124.

(f) And see further *Field v. McKenzie*, 16 L. J., N. S., C. P. 206; *S. C.*, 4 C. B. 705; *per Wilde, C. J.*, in delivering the judgment of the Court;

(g) 2 Exch. 469; and see *ante*, p. 125.

(h) 3 Exch. 598; *S. C.*, 6 D. & L. 458.

(i) See *ante*, p. 123.

to have retired from the co-partnership, and his liability as such will continue (k). If his liability has ceased for three years (l) he can plead this as a statutable answer to the *scire facias* (m). The Court will not shorten the time for showing cause against a rule for issuing a *scire facias*, on the ground that the three years limited by the statute for proceeding against retired members might expire before the execution could issue (n).

member will be presumed to continue such till he is proved to have retired from the co-partnership.

The general rule, that a matter cannot be agitated twice, does not apply to the case of an application to issue a *scire facias* upon fresh materials (o). The Court of Exchequer in the case cited, holding that "this being an application to the equitable jurisdiction of the Court to have a remedy against a second class of persons, it would be difficult to say that the Court should be so bound up by any rule as that they would not permit a second application to be made, or a second *scire facias* to issue, in case the first had failed; but that in such a case it would be proper that the party applying a second time to the Court for permission to issue a *scire facias* against members of the class secondarily liable, should lay before it some ground to show why he had failed upon the first, and show some good reason why he should apply to the Court a second time to make the defendant liable to a *scire facias*."

If the application to the Court to issue a *scire facias* against shareholders secondarily liable fail, an amended application may be made on good ground shown.

It would appear, therefore, on a review of the whole of the cases, that the Courts do not require to be satisfied that ALL the shareholders primarily liable shall have been proceeded against before they will allow writs of *scire facias* to issue against shareholders secondarily liable; but they must be satisfied that a *prima facie* case has been made out, that *bond fide* and continuous attempts have been made to obtain execution against all primarily liable, or that all due and sufficient means have been taken to recover the debt from the parties primarily liable, before they will allow the *scire facias* to go against the shareholders secondarily liable; and that it is then open to the shareholders secondarily liable to contest their liability, and to plead that all those primarily liable

Review of the cases.

(k) *Harvey v. Scott*, 11 Q. B. 106, per Denman, C. J.; *Prescott v. Buffery*, 1 C. B. 41; and see *Corder v. Universal Gas Light Company*, 6 C. B. 19.

(l) *I. e.*, if he has ceased to be a member of the co-partnership three years; sect. 13; *ante*, p. 112.

(m) See *post*, p. 139; and see *Steward v. Greaves*, 10 M. & W. 720;

Ricketts v. Bowhay, 3 C. B. 889; *Bank of England v. Johnson*, 3 Exch. 605, per Parke, B.

(n) *Field v. M'Kenzie*, 5 D. & L. 172.

(o) *Dodgson v. Scott*, 2 Exch. 457; *S. C.*, 6 D. & L. 27; and see *post*, p. 152.

have not been proceeded against, or that they were not members at the time of the contract, or that they have ceased to be members of the co-partnership altogether for more than three years; and that the plaintiff is not bound to proceed against one or all of the members for the time being, but that he may select any member he please, against whom to proceed; and that he may have concurrent writs of execution going on against all at the same time (p).

Proceedings
against
those se-
condarily
liable, on
motion after
notice.

Secondly, the case of *Fowler v. Rickerby* (q) having decided that a plea in abatement for the nonjoinder of members of such a co-partnership proceeded against by *scire facias* on a judgment obtained against the public officer of the company, would be bad, on failure of obtaining the fruits of the judgment from those members of the co-partnership primarily liable, *any member or members* of the co-partnership *secondarily liable* may then be proceeded against; but, according to the judgment in *Ricketts v. Bowhay* (r), leave to issue the *scire facias* against such selected members "must first be obtained on motion in open Court, and which motion is to be made on notice to the person sought to be charged." The notice to be given, it is presumed, must be a reasonable notice, the sufficiency of which, it seems, will be decided by the Court (s).

Form of a
scire facias
against
member at
the time of
the contract.

The *scire facias* against the members at the time of the contract ought to state the prior execution against the members at the time of the execution, which is a condition precedent, and is necessary to warrant the *scire facias* against a member at the time of the contract (t).

And lastly, the question remains, *when* those who have been members of a joint-stock banking co-partnership cease to be liable to the debts of the co-partnership altogether, and when no writ of *scire facias* can be issued against them to make them liable to any judgment obtained against the co-partnership, or against the public officer of the company (u). The words of the conclusion of the proviso of the 13th section of the Act (x) are, "that no such

(p) See *ante*, p. 132; *Nunn v. Lomer*, 3 Exch. 471.

(q) 9 Dowl. P. C. 682; *ante*, p. 129; and see *Nunn v. Lomer*, 3 Exch. 471.

(r) 3 C. B. 905, *per* Maule, J.; and see *Eardley v. Law*, 12 Ad. & E. 811, *per* Little Dale, J.; *ante*, p. 123.

(s) See judgment of Wilde, C. J., in same case, *ante*, p. 121; see, as to notice

under 68th sect. of Joint-stock Companies Act (7 & 8 Vict. c. 110) prior to motion for leave to issue execution; *Corder v. Universal Gas Light Company*, 17 L. J., N. S., C. P. 305; *post*, p. 152.

(t) *Bank of England v. Johnson*, 3 Exch. 604; 6 D. & L. 458.

(u) See *ante*, p. 129.

(x) See *ante*, p. 112, n.

execution as last mentioned" (that is, as against the class of shareholders secondarily liable) "shall be issued"—"after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership." This point was raised in the Court of Chancery, before the Master of the Rolls, in the case of *Barker v. Buttress* (y) on a decree for the administration of the estate of Jonathan Barker, deceased, formerly a member of the Imperial Bank of England. The testator died in March, 1839. In June, 1839, and September, 1839, several claimants on the estate recovered judgment against the public officer. The decree to administer the deceased's estate was obtained in December, 1842. The claimants came in under the decree, and their claim was rejected by the Master, and they excepted to his report. The case turned upon the construction of this proviso at the end of the 13th section of the Banking Act. In his decree, the Master of the Rolls, after commenting upon the section, said the testator's liability was "to have an execution issued against him and his property, provided it be done before the expiration of three years from the time he ceased to be a member. That being so, I do not see how I can afford any sort of relief in a case where the application is made to this Court long after the expiration of those three years. However, I do not mean to say anything as to a bill to be filed within the three years; but it seems to me, if relief is to be had in this Court in such a case as this, against the assets of a deceased person, it must be before the liability—the legal liability—would have expired under this Act of Parliament, if the party had continued alive; and in this state of things I do not think any remedy can be given." In the exposition of this section of the statute by Mr. Baron Parke, in the case of *Steward v. Greaves* before quoted (z), that learned judge says, "In a proceeding against individuals they would be liable to simple-contract debts for six years, to specialties for twenty; in the statutory mode of proceeding, *the members who have ceased to be such for three years, are exempt from debts of every description.*" And the same construction is adopted by Lord Chief Justice Wilde in the case of *Rickets v. Bowhay* (a) before alluded to. After a former member, 'herefore, of a banking co-partnership established under the provisions of this Act, has ceased to be such member for three years, no *scire facias* can issue against him to render him liable for any

When the liability of former co-partners ceases.

(y) *Barker v. Buttress*, 13 L. J., & W. 720; and see *Field v. M'Kenzie*, 5 D. & L. 172.

(z) See *ante*, p. 120; and see 10 M. (a) 3 C. B. 889; *ante*, p. 121.

debts of the co-partnership; but until he is *enabled to prove* that such period has elapsed (*b*), he remains liable, it would seem, to all judgment debts equally with any of the existing members of the co-partnership secondarily liable, and may be proceeded against either alone (*c*), or joined with others of the same class of members for the recovery of the fruits of a judgment debt, against the co-partnership, on the proper anterior steps being taken, which have already been pointed out (*d*).

The writ of *scire facias* must accurately set forth to which class of shareholders the person sought to be charged belongs, and must not state him to belong to both classes.

The writ of *scire facias* against the members of a public company must accurately set forth to which class of shareholders the person sought to be charged belongs. If by any informality he is shown to belong to both classes of shareholders the writ will be quashed. In the case of *The Governor and Company of the Bank of Scotland v. Fenwick* (*e*), a rule was obtained calling on the plaintiffs to show cause why a writ of *scire facias* should not be quashed, issued against the defendant on a judgment obtained against the public officer of the *North of England Joint-stock Banking Company*, of which the defendant was a shareholder, and the writ, after reciting the judgment and proceedings, stated that the defendant "at the time of the commencement of the said action in which the said judgment was so obtained as aforesaid, and at the time of the recovery and giving of the said judgment was, and from thence continually has been, and still is a member of the said co-partnership," &c. In delivering judgment, Rolfe, B., said, "The rule must be absolute. The principle of the case of *Esdaile v. Trustwell* (*f*) governs this. The statute enables a plaintiff without leave of the Court to issue a *scire facias* against a member for the time being, and, for the purpose of disposing of this question I will assume that the words "time being" mean at the time the writ issues, for I think it makes no difference

(*b*) See, as to this, *Prescott v. Buf-fery and others*, 1 C. B. 41.

(*c*) *Fowler v. Rickerby*, 9 Dowl. P. C. 682.

(*d*) And see *ante*, p. 129.

(*e*) 17 L. J., N. S., Exch. 92; *S. C.*, 1 Exch. 797.

(*f*) 16 L. J., N. S., Exch. 316; 1 Exch. 371; 2 Exch. 312. Declaration in *scire facias* upon a judgment recovered by the plaintiff as registered P. O. of the London and Westminster Bank against the registered P. O. of the Leeds and West Riding Bank-

ing Company, alleging that the defendant "at the time of such judgment being recovered as aforesaid was, and from thence hitherto hath been, and still is, a member of the said co-partnership." Demurrer for duplicity and uncertainty. Alderson, B.: "If the defendant were to plead that he was not a shareholder at the time when judgment was recovered, it would be no answer to that part of the declaration which charges him as a member for the time being." The plaintiff had leave to amend.

whether it mean at the time of the commencement of the suit. The statute also enables a plaintiff to have execution against some person who was a member of the co-partnership at the time of the judgment recovered, but in that case the leave of the Court is necessary before issuing the writ. Here the *scire facias* describes the defendant as a member for the time being, and also at the time of judgment recovered. The declaration would be in the same form, but no advantage could be taken by demurrer to such a declaration; therefore the defendant must take issue on it, and plead that he was not a member "at the time of judgment recovered," or "for the time being." If it should turn out at the trial that the defendant was a member at the time of judgment recovered, though not for the time being, the plaintiff would be entitled to execution though the writ had issued without leave of the Court." Rule absolute with costs.

A declaration in *scire facias* against a member for the time being of a banking co-partnership under 7 Geo. IV. c. 46, sufficiently describes the defendant as "now a member of the said co-partnership" (g). For if the defendant had ceased to be a member of the company before the issuing of the writ, that fact could be taken advantage of by plea (g).

But the declaration against a member of a banking company under 7 Geo. IV. c. 46, must aver that the debt upon which the judgment was recovered against the public officer of a company in the original action was a debt due from the company, or it will be bad on special demurrer; otherwise it would be consistent with the declaration that the debt recovered was not the debt of the company, but that the judgment recovered against the public officer was one for which he was personally liable (h).

The scire facias against a member must aver the debt to be due from the company.

Execution cannot be issued against a person as a member for the time being of a joint-stock banking company (against a public officer of which a judgment has been recovered), unless he legally fill that character. Where a married woman, with her own separate property and with her husband's consent, purchased shares in her own name in a company, and was registered as a shareholder and returned as such to the stamp office, and her husband received the dividends as her agent, and did acts by which he held himself out to the world as a member, it was held that execution could not be sued out against him upon a *scire facias* as a member of the company for the time being (i).

Hitherto our attention has been confined to cases arising on

- (g) *Nunn v. Claxton*, 3 Exch. 712; (h) *Ness v. Fenwick*, 2 Exch. 598.
6 D. & L. 637. (i) *Ness v. Angass*, 6 D. & L. 645.

Decisions in other cases not banking companies.

the statute 7 Geo. IV. c. 46, affecting banking co-partnerships. There are, however, numerous cases arising under local and personal acts affecting particular companies, which contain provisions of a similar nature to those contained in the 12th and 13th sections of the 7 Geo. IV. c. 46, the decisions in which, being *in pari materid*, have been referred to and adopted in discussing many of the questions arising under the Banking Co-partnership Act affecting joint-stock banking co-partnerships.

If a nominal defendant collusively suffer judgment by default, the shareholders should apply to the Court to set aside the proceedings.

In the case of *Bradley and others v. Eyre and another*, which was an action brought by the plaintiffs against the secretary of "The Patent Rolling and Compressing Iron Company," in which, having recovered judgment, they issued a *scire facias* against the defendants as shareholders, it was decided that if the secretary of such a company, as the nominal defendant, *collusively suffer judgment by default*, and the shareholders are taken by surprise, they should apply to the Court to set aside the proceedings (*k*). The 12th section of this Act, it will be seen (*k*), differs in its terms

(*k*) *Bradley and others v. Eyre and another*, 11 M. & W. 432; S. C., 1 D. & L. 260. *Scire facias* against the defendants as shareholders of the Patent Rolling and Compressing Iron Company on a judgment obtained against the secretary, averring that the defendants and others were at the time of the recovery of the judgment, and from thence have been, and still are, shareholders of the company. Plea that the secretary was not secretary pursuant to the statute creating the company. Held that, even if he were not such secretary, the judgment having been obtained against him as such the company would still be bound by it, and that if the nominal defendant collusively suffer judgment by default, the shareholders should apply to the Court to set aside the proceedings. Held also, that the defendants were not at liberty to plead to the declaration in *scire facias* any matter which might have been pleaded or set up as a defence to the original action.

Defendants cannot plead to a declaration in *scire facias* what might have been pleaded as a defence to the original action.

By the 12th sect. of the Act (4th & 5th Vict. c. 89, entitled "An Act to enable the Patent Rolling and Com-

pressing Iron Company to purchase certain Letters Patent, and to sue and be sued") it is enacted, "that it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against any such nominal party as aforesaid, to be issued against *all or any of the shareholders for the time being of the company*, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to cause execution to be issued against any person who was a shareholder of the company at the time the contract was entered into upon which such action or suit was instituted: Provided always, that no such execution against any person being or having ceased to be a shareholder shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained upon motion in open Court, and after notice of such motion given to the person sought to be charged: Provided also, that no person having ceased to be a share-

from the 13th section of the 7 Geo. IV. c. 46, as to the liability of the shareholders, and the decision upon it, therefore, as to the mode in which execution must issue against shareholders, does not affect the decisions on the 18th section of the former statute in this respect.

In the case also of *Phillipson, Pub. Off. v. The Earl of Egremont* (1), which was a declaration in *scire facias* by the plaintiff as public officer of the Northumberland and Durham District Banking Company under the stat. 7 Geo. IV. c. 46, against the defendant as a member of a trading company called the Commercial Steam Packet Company, against the public officer of which company judgment had been obtained; the fifth plea stated that the company and their officer were not liable in the original action, but that their officer had suffered judgment by connivance with the plaintiff, in order to charge the present defendant. Lord Chief Justice Denman, in delivering the judgment of the Court, said, as to the non-liability of the company, that defence should have been pleaded to the original action (m); but the gist of the plea was that the company not being liable by law, their officer "fraudulently and deceitfully, and by connivance with the plaintiff, suffered the judgment in order to charge the defendant. Now if these allegations be true, the defendant certainly ought to have some remedy, and the question is whether that remedy is by pleading as he has done, or by motion to the Court. We are far from saying that the latter course was not open to the defendant. Fraud, no doubt, vitiates everything; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate its own judgment, as is suggested in *Bradley v. Eyre* (n); but still such a plea as the present may be good: and, indeed, we find in *Fowler v. Bickerby* (o), that Tindal, C. J., stated that it would

holder of the company shall be liable for the payment of any debt for which any such judgment, decree, or order shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same; nor shall this Act be deemed to enable any party to a suit to recover from any individual shareholder of the company or any other persons whomsoever any other or greater sum than might have been recovered if this Act had not been passed." *Held*, that exo-

cution must first issue against those persons who were shareholders at the time it was issued, provided they were shareholders at the time of the contract, and would have been liable to the plaintiff if the action had been brought against them instead of the nominal defendant.

(1) 6 Q. B. 587.

(m) See *ante*, p. 142, n.; *Bradley and others v. Eyre*, 11 M. & W. 432.

(n) *Ante*, p. 142, n.; 11 M. & W. 450.

(o) *Ante*, p. 129; 2 M. & G. 760; 9

be good. If the plea had alleged a fraud practised on the original defendant, it would have been open to the answer that it should have been pleaded to the original action; but as it alleges fraud and collusion between the plaintiff and the defendant in the action for the purpose of charging the present defendant, there was no opportunity for him to plead it before." On this plea the Court gave judgment for the defendant.

Omission to obtain the leave of the Court where necessary to issue a *scire facias*, is an irregularity merely, to be promptly taken advantage of.

In the case of *Bradley and others v. Warburg and others* (p), which was a *scire facias* against the defendants on a judgment recovered against the secretary of the Patent Rolling and Compressing Iron Company, as shareholders of the company, and to which there was a plea in bar that the writ of *scire facias* was issued without the leave of the Court, as required by the Act of the company, it was held on demurrer to the plea that the omission to obtain the leave of the Court to issue a *scire facias* against a shareholder of the company, where such leave was necessary, was an irregularity merely, for which an application should be made to the Court to set aside the writ. It will be seen that the terms of this proviso are exactly similar

Dowl. P. C. 682; see also *Bosanquet v. Graham*, 7 Jur. 831, in which case the public officer of the Southern District Banking Company gave a warrant of attorney to confess judgment to the plaintiff, on which a *scire facias* was issued against the defendant as a member of the company; and, on motion to set aside the judgment, and *scire facias* thereon, amongst other grounds that the warrant of attorney and the judgment thereon were collusively and fraudulently obtained, Lord Denman, in delivering the judgment of the Court, said: "The Lord Chief Justice of the Common Pleas is supposed to have laid it down in *Fowler v. Rickerby* (2 M. & G. 760), that collusion between the plaintiff and the public officer of a company who gives a warrant of attorney cannot be pleaded to a *scire facias*, but we do not so construe that which fell from his Lordship; and, we are informed that the Court of Exchequer have lately determined, that a registered member who is made a defendant by *scire facias* cannot plead there-

to—that the person signing a warrant of attorney as public officer was not such public officer. In either of these cases it is admitted on all hands to be clear that the Court may interfere on motion to set aside the judgment."

(p) 11 M. & W. 452; S. C., 2 D. N. S. 1059. Plea that the *scire facias* issued without the leave of the Court on motion. Demurrer. By a proviso to the 12th sect. of the statute incorporating the Company it is enacted, "that no such execution against any person being or having ceased to be a shareholder shall be issued without leave first granted by the Court in which such judgment, decree, or order shall have been obtained upon motion in open Court, and after notice of such motion given to the person sought to be charged." Held, that the issuing of a *scire facias* without the leave of the Court could not be pleaded as a defence in bar of the action, but was an irregularity merely for which an application might be made to the Court to set aside the writ.

in effect to the terms of the proviso at the end of the 13th section of the 7 Geo. IV. c. 46 (g). This decision would therefore be an authority in cases under the latter statute, should the point arise.

So also in the subsequent case, in the same court, of *Bradley v. Urquhart* (r), where, after the defendant had pleaded to a *scire facias*, and a demurrer to his plea had been argued, it was moved to set aside the *scire facias* on the ground that it had been issued without the leave of the Court, such leave being required under the 12th section of the Act of the Patent Rolling and Compressing Iron Company. Parke, B., in delivering judgment, held the motion to be too late. "The statute does not say, that, unless leave be first granted by the Court, the *scire facias* shall be void to all intents and purposes, but only that no execution shall issue without leave first granted by the Court. If that be not done, the defendant should take the objection in due time, and not plead to the *scire facias*."

In *Bradley and others v. Urquhart and another* (s), it was decided that the proceeding by *scire facias* against the shareholders of a company does not differ from the ordinary *scire facias*, to which no defence can be pleaded which could have been pleaded to the original action. Parke, B., in delivering judgment, saying, "A defendant cannot plead to a *scire facias* what he could have pleaded to the original action, otherwise there would be no need of the proceedings. Though the particular mode of obtaining execution against the shareholders of this company is given by the Act of Parliament, yet the proceeding does not differ from the ordinary *scire facias*, to which a defendant can only plead matters which do not impeach the judgment."

No defence can be pleaded to a *scire facias* which could have been pleaded to the original action.

As, under the Bank Act, in an early case under this statute, it was determined that the only mode of proceeding against an individual shareholder was by *scire facias*. In *Clowes v. Brettell* (t), which was an action against the secretary of the Patent Rolling

(g) See last note, and *ante*, note, p. 112.

(r) 11 M. & W. 583.

(s) 11 M. & W. 456; *S. C.*, 2 Dowl. N. S. 1042. *Scire facias* against defendants as shareholders of the Patent Rolling and Compressing Iron Company on a judgment recovered against the secretary of the company. Plea, that no memorial of the names, residences, and descriptions of the di-

rectors had ever been duly enrolled in the Court of Chancery in the manner required by the 24th sect. of the Act. Held, on demurrer, that the plea was bad, as setting up a defence which might have been pleaded to the original action. See also, as to this point, *Bradley v. Eyre*, 11 M. & W. 432; *ante*, p. 142, n.

(t) 10 M. & W. 506; *S. C.*, 2 Dowl. N. S. 528.

and Compressing Iron Company, to recover the expenses of printing advertisements on the order of the secretary before the passing of the Act of Parliament, in which the plaintiff recovered judgment, and thereupon concluded himself entitled to proceed against the individual shareholders, under the 11th and 12th sections of the Act; sect. 11 enacting that "every judgment, &c., should and might be lawfully executed against, and (subject to certain restrictions) should have the like effect upon the person and estate of every individual shareholder, as if he had been by name a party to such proceedings;" and sect. 12 enacting that it shall be lawful for the plaintiff to cause execution issued upon any judgment obtained against the nominal defendant "to be issued against all or any of the shareholders for the time being of the company," &c. (u). The plaintiff, having failed to obtain satisfaction for his debt, on issuing execution against the secretary, gave notice to a shareholder, and obtained a rule calling upon him to show cause why execution should not issue against him or his goods; and it was urged, in argument in support of the rule, "that execution ought to issue in the first instance without a *scire facias*, under the provisions of the 11th section of the Act."

There must be a *scire facias* against the shareholder to render him liable.

But the Court held, in accordance with the principle laid down in the case of *Bosanquet v. Ransford* (x), that there must be a *scire facias* against the shareholder, and "then, if any point could be raised on the construction of the Act of Parliament, it might be raised upon the *scire facias*, and solemnly determined."

So, also, in the case of *Wingfield v. Barton* (y), which was also an action against the secretary of the Patent Rolling and Compressing Iron Company, in which, judgment having been obtained against the secretary, execution had been issued against the goods of the company, and on a return of *nulla bona* a motion was made for leave to issue execution against certain shareholders secondarily liable under the 12th section of the Act (z), on affidavit that notice had been given them of the motion, and that they were shareholders before the commencement of the suit within the requisites of the Act. Patteson, J., referring to the case of *Bosanquet v. Ransford* (a), and to the mode of proceeding against shareholders under the 13th section of the Bank Act, said he could see no distinction between the 12th section of this

(u) See the section *in extenso*, ante, p. 142, n.

(x) See ante, p. 116; see also *Clowes v. Brettell*, 11 M. & W. 461.

(y) 2 Dowl. N. S. 355.

(z) See ante, p. 142, n.

(a) Ante, p. 116; 12 Ad. & E. 813.

Act, and the 13th section of the Bank Act. "The plaintiff had better, therefore, take a writ of *scire facias* by leave of the Court."

The rule, on motion for leave to issue a *scire facias* against members secondarily liable under this statute, has been held to be absolute in the first instance (b).

It has been already seen that it was decided under the Banking Co-partnership Act (7 Geo. IV. c. 46), in the case of *Steward, Pub. Off. v. Greaves and others* (c), that it is compulsory, in all actions against any company formed under that Act, to proceed first against the public officer of the company before any steps are taken against individual shareholders. It has also been held that all actions by such a company must be commenced in the name of their public officer. This point was decided in the case of *Smith v. Goldsworthy* (d), in which the plaintiff declared as the secretary to the British Iron Company. This company was first established under a deed of settlement, afterwards an Act of Parliament was obtained for carrying on the business of the company (3 & 4 Vict. c. 94, local, personal, and public, "for granting certain powers to the British Iron Company"); and after reciting that difficulties had arisen in recovering debts due to the company, and that it would be convenient that persons having demands against the company "should be entitled to sue the secretary," it proceeds to enact that all actions and suits "wherein the said company is or shall be interested" "*shall and lawfully may*" be commenced and prosecuted "in the name of the person who shall be secretary of the said company at the time," &c. The action was brought on a covenant in the deed of settlement for paying instalments on the shares, made with three individuals, promoters of the undertaking, and not in any official or representative capacity, and it was contended that the action should have been brought in their names and not in the name of the secretary. But the Court of Queen's Bench held, referring to the decision in the case of *Steward v. Greaves* in the Court of Exchequer, that "whenever a company *may* sue by their public officer they are bound to do so," and that the action was rightly brought in the plaintiff's name as the secretary of the company (e).

Whenever a company may sue by their public officer they are bound to do so.

(b) *Johnson v. Brettell*, 7 Jur. 219.

(c) 10 M. & W. 711; *ante*, p. 118, n.

(d) 4 Q. B. 430; and see *Wills v. Sutherland*, 4 Exch. 211, and *ante*, p. 119; *Chapman v. Milvain*, 1 L. M. & P. 209.

(e) See also the case of *Skinner v.*

Lambert, 4 Man. & G. 477; S. C., 5 Sco. N. R. 197, which was an action by the plaintiff, as secretary of the Monmouthshire Iron and Coal Company, against the defendant, a shareholder, on a covenant in the deed of settlement made by the defendant with

Exceptions
to this rule.

There are, however, some cases in which it has been held that *it is not necessary* to sue the public officer or secretary of a public company in the first instance, and afterwards to proceed against the shareholders of the company for execution on the judgment obtained, by *scire facias*; but that the shareholders *may* in the first instance be proceeded against. An examination of these cases, however, shows that the exemption does not arise from any confusion or difference of decision in the Courts, as to the construction of any permissive words to sue and be sued in the name of the secretary or public officer of a public company, but rests entirely on the express words of the statutes under which such companies are formed. Thus, in the case of *Beech v. Sir James Eyre, Bart.* (*f*), which was an action for goods sold and delivered, brought by the plaintiff against the defendant as an original subscriber and *shareholder* in the Patent Rolling and Compressing Iron Company, for goods furnished to that company. It was contended at the trial that the secretary, or a director of the company, under the provisions of the private Act (4 & 5 Vict. c. 89), should have been sued, and not the defendant, as a shareholder; the 5th section enacting that in all actions against the company "*it shall be sufficient* to state the name of the secretary, or some one of the directors," as the nominal defendant (*g*). On referring, however, to the 17th section of that Act, that section provides, "that in case any action, suit, or other proceeding, in respect of any demand against the company, *shall be instituted or prosecuted against any shareholder, or former shareholder, of the company, in any*

certain trustees therein named for the payment of calls, in which it was held that the words of the private Act were sufficiently large to authorize such a suit by the secretary against a shareholder, and that the action was rightly brought in the name of the secretary, and not in the names of the trustees.

(*f*) 5 M. & Gr. 415; S. C., Sco. N. R. 327.

(*g*) The 5th sect. provides as follows:—"That in all actions, suits, and other legal proceedings other than proceedings of a criminal nature, &c., to be thereafter instituted or prosecuted by or on behalf of the said company, either alone or jointly with any other necessary parties, *it shall be sufficient*

to state and to proceed in the name of the secretary, or one of the directors for the time being of the company, as the nominal plaintiff representing the company in such proceedings; and that in all actions, suits, and other legal proceedings to be thereafter instituted or prosecuted against the company, either alone or jointly with any other necessary parties, *it shall be sufficient to state* the name of the secretary, or some one of the directors; or, where there shall be no secretary or director, then the name of some one of the shareholders for the time being of the company, as the nominal defendant representing the company in such proceedings."

other manner than under the powers and authorities hereinbefore given; and in case such shareholder shall, by virtue of any judgment or decree in such action, suit, or other proceeding, or under any execution to be issued in respect thereof, or otherwise, pay any sum of money, damages, costs, or expenses, he shall in respect of such last-mentioned payment, be entitled to all such indemnities, rights, powers, and remedies in all respects for reimbursing himself, or for enforcing contribution, according as the case may be, in respect of all moneys, damages, costs, or expenses so paid by him as aforesaid, as are hereinbefore given in cases where execution shall have issued upon any judgment or decree obtained in any action, suit, or other proceeding, instituted or prosecuted under the powers given by this Act." Thus clearly contemplating and providing for the case where an individual shareholder should be sued for any debt due by the company (*h*). And Tindal, C. J., in delivering judgment, says, "The 5th section (*i*) does not state that in actions against the company parties *shall* sue, but only that 'it shall be sufficient to state,' &c., evidently showing that the clause was merely meant to confer a power or privilege, but not to impose an obligation." "On referring to the 12th and 17th sections, it clearly appears that *the right of third parties to sue individual members of the company, is distinctly reserved*; for both of these clauses contemplate that the case may occur of actions being brought against individual shareholders."

So, in the case of *Blewitt v. Gordon* (*k*), which was an action brought against the defendant as a shareholder of the Monmouthshire Iron and Coal Company, the 1st section of the private Act of which company enacts that "all actions, suits, and other proceedings to be commenced, instituted, or prosecuted against the said company *shall and lawfully may* be commenced, instituted, and prosecuted against the secretary for the time being, or against any one of the elected directors for the time being, of the said company, as the nominal defendant, respondent, or defender in such last-mentioned actions, suits, or proceedings, for or on behalf of the said company;" it was contended that the words "shall" and "lawfully may" did not deprive the plaintiff of his common-law right to sue any one of the partners in the partnership which had become indebted to him. Coleridge, J., in delivering judgment, (referring to the preamble and first section of the Act above

(*h*) See now as to this 11 & 12 Vict. c. 45, s. 5.

(*k*) 1 Dowl. N. S. 815; and see *ante*, p. 118, n.

(*i*) See the case, *ante*, p. 148.

quoted), said, "If I stood here alone, and considering the words of the preamble merely, I must hold that *this was a provision in favour of the public against the company*, in order to remove the necessity of being compelled to sue all the individual members, and then the enacting clause carries out that intention." His Lordship, having referred to sects. 27, 10, and 4 (*l*), quoting the last section, said, "Here is a provision that a *proprietor*, being sued, may plead a former recovery for the same demand in answer to an action or suit brought against him."

These cases cannot be considered as at all running counter to the principle laid down in *Steward v. Greaves* (*m*) and *Chapman v. Milvain* (*n*), but must be viewed as depending upon particular enactments. The last-cited cases indeed *affirm* the principle, "that whenever a company may sue or be sued by their public officer, the public officer must be plaintiff or defendant, and that resort to the shareholders must be had afterwards by writ of *scire facias*."

Where judgment has been signed against a public officer under a warrant of attorney, and it is afterwards sought to issue a *scire facias* on the judgment, the Court on motion will direct an issue to try such matters as might have been raised by plea to the action.

In a judgment obtained on a warrant of attorney, by the trustees of the London and Westminster Bank, given by the public officer of the Southern District Bank, on which a *scire facias* was issued against several shareholders, the Court of Queen's Bench, on motion, directed an issue to try whether a partnership, called the Southern District Banking Company, was ever constituted, whether the defendants were partners in the company, and if so whether they were indebted to the plaintiffs, and in what sum; and in the trial of such an issue it was held that the defendants could not object that some parties on the record were members of both companies (*o*).

(*l*) Sect. 27 provides, that nothing therein contained should be deemed or construed to incorporate the company, or to relieve or discharge any of the proprietors from any responsibility, duty, obligation, or contract whatsoever.

Sect. 10 provides, that if any proprietor is sued in respect of a debt due from the company "in any other manner than under the powers and authorities for suing and being sued hereinbefore given," such proprietor should have power of enforcing contribution from the other proprietors for all damages and costs he has been compelled to pay.

Sect. 4 enacts, "that no person

having any demand against the company shall bring more than one action or suit in respect of such demand; and in case the merits in respect of any such demand shall have been finally determined in any action or suit, then the proceedings in such previous action or suit may be pleaded in bar of any such other or subsequent action or suit which may be commenced or instituted in respect of the same demand against the secretary, or against any other director or *proprietor*, of the said company."

(*m*) 10 M. & W. 711; *ante*, p. 118.

(*n*) 1 L. M. & P. 209; *ante*, p. 119.

(*o*) *Bosanquet and others v. Wood-*

If the judgment upon which a *scire facias* issues be void for any irregularity, the *scire facias* founded upon it is a nullity. In *Bosanquet v. Graham* (p), in which a warrant of attorney had been given by the defendant, as one of the public officers of the Southern District Banking Company, to the plaintiff "to enter up judgment as of the preceding Hilary term, next Easter term, or any other subsequent term," and judgment was signed "as of Hilary term" in the vacation following, and the writ of *scire facias* against the defendant was tested in vacation; it was held that the *scire facias* was void, being tested in vacation (q).

In the case of some companies, the shareholders are exempt from personal liability by the private statutes under which they are formed, the plaintiff's only remedy being against the property of the company. Such cases, however, do not properly come within the purview of the present work, the writ of *scire facias* being inapplicable (r).

In a *scire facias* on a judgment recovered against the secretary of the Indian Steam Ship Company, to have execution on the judgment against a shareholder, it was held that the *onus* lies on the plaintiff to show that he is, or was, within three years of the judgment obtained, such a shareholder, according to whichever class of shareholders he is charged in the declaration to belong (s).

In companies under the operation of the statutes 7 & 8 Vict. c. 110 (t) and c. 118 (u), no suggestion or *scire facias* is necessary in order to have execution against a shareholder on a judgment obtained against the company, but execution may be issued by leave of the Court, or a judge of the Court in which the judgment

ford and others, 5 Q. B. 310; and see stat. 1 & 2 Vict. c. 96, s. 1 (continued by subsequent statutes, and made perpetual by stat. 5 & 6 Vict. c. 85), which enacts that actions by or against a banking co-partnership may be brought by or against the public officer of such co-partnership in the name of such public officer, by or against any member of such co-partnership, as if he were a stranger. See also *Bosanquet v. Graham*, 7 Jur. 831.

(p) 7 Jur. 831.

(q) See also the case of *Cobbold v. Chilver*, 1 Dowl. N. S. 727, as to signing judgment "as of" a term in

vacation; and *Rayment v. Smith*, 7 Jur. 674; *Jarvis v. South*, 13 M. & W. 152.

(r) *Harrison v. Timmins*, 4 M. & W. 510; *S. C.*, 7 Dowl. 28; *Carpe v. Glyn*, 3 B. & Ad. 801; and see the cases in Chit. Arch. Prac. 8th ed. 1042.

(s) *Scott v. Berkeley*, 3 Com. Bench, 937, *per Williams, J.*; *The Governor and Company of the Bank of Scotland v. Fenwick*, 17 L. J., N. S., Exch. 92; *ante*, p. 140; and see *ante*, p. 136.

(t) Sect. 68.

(u) Sect. 13.

Scire facias against shareholder of joint-stock company not necessary, when.

was obtained, upon motion or a summons for a rule to show cause after ten days' notice to the shareholder (x).

Execution cannot issue against shareholder of joint-stock company under 7 & 8 Vict. c. 110, on motion, without ten days' notice given.

Where, however, a plaintiff obtained judgment against a joint-stock company, and, being unable to obtain satisfaction of his judgment against the property of the company, gave notice to a shareholder that application would be made to the court or a judge for leave to issue execution against him on the judgment, a summons was taken out and dismissed before a judge at chambers; and, on application being made to the Court by the plaintiff, without fresh notice being given to the shareholder of such intended application, it was held that the notice of application was exhausted by the summons (y); Wilde, C. J., in delivering the judgment of the Court, saying, "The legislature had thought fit to enact that before application is made to issue execution on final process against a person who was not primarily liable thereto, such person should have ten days' notice, and had given the applicant power to go to the Court or before a judge. This notice informs a party that an application for leave to issue execution will be made to the Court or a judge; and, accordingly, a summons was issued, the parties attended before a judge at chambers, and he dismissed the summons. Now, this came before the Court as an original application, but there was no notice to support it; for the only notice given had been acted on, and its efficacy was exhausted after an application was made."

If notice insufficient application may be renewed.

If the application to the Court be renewed upon fresh notice, after being once dismissed on the ground of the insufficiency of the notice, the Court will not refuse again to hear it on the ground that it is *res judicata*, because the substantial question whether or no the defendant be a shareholder has not been discussed; otherwise the Court would not suffer the matter to be re-opened (z).

It has been held under this statute that the 68th section, which empowers the Court, or a judge at chambers, to order execution to issue against a shareholder of a registered joint-stock company, without suggestion or *scire facias*, in actions "at the suit of shareholders," applies to the 66th and 67th sections of the Act, which have reference to executions on judgments in actions at the suit of creditors and other persons, as well as share-

(x) See *ante*, as to this, book i. ch. vii. p. 90; and see *ante*, *ib.* p. 92; and see Wordsworth on Joint-stock Companies, 5th ed. pp. 158, 174.

(y) *Corder v. Universal Gas Light*

Company, 17 L. J., N. S., C. P. 305.

(z) *Ibid.*; 6 Com. B. 190; S. C., 6 Com. B. 554; *Dodgson v. Scott*, 2 Exch. 457; and see *ante*, p. 137.

holders (a). But, in order to obtain leave to issue such execution, the creditor must, under the 66th section, use due diligence to obtain satisfaction from the assets of the company; therefore, where the affairs of the company are being wound up under the 11th and 12th Vict. c. 45, the creditor must, in the first instance, prove his debt before the Master (b).

"The Joint-stock Companies Winding-up Act, 1848," recently passed, (the 11 & 12 Vict. c. 45,) after pointing out how the affairs of a joint-stock company may be wound up, or a fiat in bankruptcy be issued against it (sect. 5), on the petition of any "contributor" (shareholder), or on a resolution of the members of the company that it is unable to meet its engagements, &c.; and after providing that the Master in Chancery to whom the matter may be referred may appoint an official manager of such company (sect. 22), in whom all the estates, effects, credits, and powers of the company are to vest on his appointment (sect. 29), and in whose name such dissolved companies are to sue and be sued (sect. 50), proceeds to enact, in sect. 56, that orders and decrees in a Court of Equity, against the official manager, may be enforced and executed against the company and every shareholder, upon an order for that purpose obtained, upon motion to be made *ex parte* in open court. And in sect. 57, "that all judgments which shall be entered up in any action at law, against the official manager of any such company, shall have the like effect and operation upon and against the property of such company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner as if such judgments had been entered up against such company, or against any person duly authorized to be sued on behalf of the same."

Effect of
Joint-stock
Companies
Winding-up
Act.

The effect of the 73rd section, it has been held (b), is, that all persons in the situation of creditors are in the first instance to prove their debts before a Master in Chancery, who has power to enforce payment from each individual liable to contribute, and thus provide a fund for the partnership debts. The creditors, having proved their debts, are entitled to be paid. That mode of obtaining satisfaction for their debts is substituted by the 11 & 12 Vict. c. 45, for the remedy given by the former Act; but if it should turn out to be abortive, the Court of Exchequer will in its discretion allow an unpaid creditor to issue execution against the persons liable to contribute. In the mean time, by the true construction of the 11 & 12 Vict., so long as there is a reasonable

(a) *Peart v. The Universal Salvage Company*, 6 D. & L. 322.

(b) *Thompson v. The Universal Salvage Company*, 3 Exch. R. 310.

prospect of obtaining payment by proving the debt under the provisions of that Act, it is the duty of the Court to prevent individual creditors from having execution against the shareholders of a company (c).

Summary. Briefly, then, to sum up the decisions respecting the mode of issuing execution against the shareholders of public companies established prior to the stats. 7 & 8 Vict. c. 110 and c. 113, such shareholders are divided under the Banking Act, and generally under other Acts for establishing public companies, into two classes—those primarily and those secondarily liable (d) to the judgment. A *scire facias* is the only mode of proceeding against any shareholders (e) on the judgment against a banking co-partnership, which *must* be obtained first against the public officer (f), and not against individual shareholders. Against those members of banking co-partnerships who are primarily liable, i. e., against those who are members “for the time being,” or, *when the writ issues*, the writ of *scire facias* on the judgment may issue at once (g), without the leave of the Court (h). Against those who are secondarily liable, the leave of the Court, after reasonable notice to the person to be charged is required before the *scire facias* can be issued (i); and such leave will only be granted on a *prima facie* case being made out to satisfy the Court that a *bond fide* and continuous (k) attempt has been made to recover the debt against the existing shareholders (l), though it is not necessary to show to the Court that steps have been taken against *all* the existing shareholders (m). The *scire facias* must issue in the first instance against any member or members “for the time being,” i. e., when the writ issues (n); and concurrent writs against any number of such members may issue (o). If a *scire facias* be allowed by the Court to issue against those secondarily liable, they are not concluded thereby, but may plead to it that all steps have not been taken against those primarily liable (p). But no defence can be pleaded to a *scire facias* which could have been pleaded to the

(c) *Thompson v. The Universal Salvage Company*, 3 Exch. 318, per Parke, B.

(d) See *ante*, p. 121.

(e) See *ante*, p. 113.

(f) See *ante*, p. 118.

(g) See *ante*, p. 115.

(h) In some other cases it issues on motion, and the rule is absolute in the first instance (*Johnson v. Brettel*, 7

Jur. 219, *ante*).

(i) See *ante*, p. 123.

(k) *The Bank of England v. Johnson*, 3 Exch. p. 598; 6 D. & L. 458, S. C.

(l) See *ante*, pp. 124, 135.

(m) See *ante*, p. 124.

(n) See *ante*, p. 126.

(o) *Ante*, p. 130.

(p) See *ante*, p. 136.

original action (q). A person once shown to be a member of a co-partnership will be presumed to continue such till the contrary be shown (r); and his liability will continue till he can show that he has ceased to be a member of the co-partnership for three years (s). If the nominal defendant collusively and fraudulently suffer judgment by default, the shareholders should apply to the Court to set aside the judgment and the proceedings thereon (t). The omission to obtain the leave of the Court to issue a *scire facias* when required is an irregularity merely to be taken advantage of in due time, and which may be waived by pleading (u). A public officer cannot plead his own personal bankruptcy in bar of an action against the company (x). If judgment has been signed against a public officer on a warrant of attorney, the Court, on the application of shareholders, will direct an issue to try matters that might have been pleaded to the action (y). If the judgment upon which the *scire facias* issues be void for any irregularity, the *scire facias* is a nullity (z).

For forms, and references to the forms, of writs and declarations in *scire facias* in these cases, see *post*, Appendix.

(q) *Ante*, pp. 142, 145.

(r) *Ante*, pp. 137, 140.

(s) *Ante*, p. 139.

(t) *Ante*, p. 142.

(u) *Ante*, p. 144.

(x) *Ante*, p. 119.

(y) *Ante*, p. 150.

(z) *Ante*, p. 151.

CHAPTER III.

SCIRE FACIAS ON THE MARRIAGE OF FEME PLAINTIFF
OR DEFENDANT.

Of the Husband's Rights to the Wife's Choses in Action, p. 156.

For the Recovery of Debts due to the Wife before Coverture, p. 156.

Of the Wife's continuing Interest therein in Case of the Husband's Death before Execution, p. 157.

Scire Facias for the Wife as Survivor on Judgment by Husband and Wife, p. 157.

For the Recovery of Debts accruing to the Wife after Coverture, p. 157.

Scire Facias for the Husband as Survivor, p. 157.

For the Recovery of Debts due by the Wife before Coverture, p. 158.

When Action commenced by or against the Wife dum sola, Scire Facias not necessary, p. 159.

Of the Writ of Scire Facias where a Judgment has been obtained by or against a Feme Sole before Coverture, p. 160.

Where Judgment obtained by the Wife, p. 160.

Where Judgment obtained against the Wife, p. 160.

Effect of Scire Facias by or against Husband and Wife on Judgment recovered by or against the Wife whilst sole, p. 161.

The Venue of the Marriage need not be alleged, p. 162.

Of the husband's rights to the wife's choses in action.

MARRIAGE is a qualified gift to the husband of his wife's *choses in action*, upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife, without having reduced her *choses in action* into possession, she, and not his personal representatives, will be entitled to them (a).

For, of the recovery of debts due to the wife before coverture, husband and wife must join.

For debts due to the wife, and for all causes of action accruing to her *before* coverture, the husband must join in the action (b); otherwise the defendant may plead the coverture of the wife in abatement (c), and since the husband cannot disagree to his wife's interest in her *choses in action* accruing before marriage, and he has only a qualified right to them by reducing them into possession

(a) Roper on Husband and Wife, 2nd ed. vol. 1, p. 204; *M'Neilage v. Holloway*, 1 B. & Al. 218; Co. Litt. 351. b.; Com. Dig. Baron and Feme, E, 3.

(b) Bac. Abr. tit. Baron and Feme, K, 732.

(c) Com. Dig. tit. Pleader 2 A, 1. The marriage of a feme sole, plaintiff, pending the suit, does not actually

during her life he is enabled alone to maintain an action for such property without making his wife a party (*d*).

If the husband should die, and the wife continue the suit, the money when recovered would be her own, and would not be assets to the executor of the husband (*e*). And if the husband should die after judgment and before execution sued out, the judgment would survive to her, and she would be entitled to a *scire facias* upon such judgment (*f*) to have execution upon it.

But for debts accruing to the wife *during* the marriage, the husband may proceed to recover them in his own name, because the right of action accrued *after* marriage, and the husband can then disagree to his wife's interest, and make his own absolute; an intention to do which he manifests by bringing the action in his own name when it might have been commenced in the names of both (*g*). In such a case, if the husband should die after judgment, his representatives, and not the wife, would be entitled to the benefit of it; the nature of the debt being altered by the judgment (*h*).

So, if husband and wife obtain judgment for the proper debt of the wife, and afterwards the wife die before execution, the

Of the wife's continuing interest therein in case of the husband's death before execution.

Scire facias for the wife as survivor on judgment by husband and wife.

For recovery of debts accruing to wife after coverture, husband may sue alone.

Scire facias for the husband as survivor.

abate it, but merely renders it abatable; Bro. Abr. Brief, pl. 232; *Lee v. Maddox*, 1 Leon. 168; and therefore the defendant must plead it if he would take advantage of it; *Morgan v. Painter*, 6 T. R. 265; *Hollis v. Freer*, 5 Dowl. 47; 2 Arch. Prac. 410; and see *Milner v. Milnes*, 3 T. R. 631. Per Lord Kenyon, C. J.: "It is extremely clear, on the one hand, that the marriage gives to the husband all the personal estate which the wife has in possession: it is also clear, on the other hand, that where a *chose in action* of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it must be brought in the names of the husband and wife." And see *Caudell v. Shaw*, 4 T. R. 361, and *Beard v. Webb*, in error, 2 B. & P. 93, in which the authorities are collected. The reasons of this rule of law seem to be, because a married woman cannot appoint an attorney, and because the husband might release the debt if he thought fit." The husband

must therefore be joined, as the phrase is "for conformity."

(*d*) Roper on Husband and Wife, vol. i. p. 214, 2nd ed.; *Hardy v. Robinson*, 1 Keb. 440; *Tyrell v. Bennett*, 2 Keb. 89; Noy, 70; *Milner v. Milnes*, 3 T. R. 627; *Runsey v. Geo*, 1 M. & S. 176.

(*e*) *Anon.* 12 Mod. 346.

(*f*) Roper on Husband and Wife, vol. i. p. 212; *Oglander v. Baston*, 1 Vern. 396; 2 Ves. 677; 12 Mod. 346; 3 Lev. 403; Noy, 70. So, costs ordered by rule of Court to be paid to the husband and wife were held to survive to her; *Till v. Bartlett*, Hanm. 104.

(*g*) Roper on Husband and Wife, 2nd ed. vol. i. p. 213; *Hilliard v. Hambridge*, Aleyn, 36; Owen, 82; 2 Mod. 217; 1 Stra. 230; Cro. Jac. 399; *Ankerstein v. Clarke*, 4 T. R. 616; *Philiskirk v. Puckwell*, 2 M. & S. 393.

(*h*) Roper on Husband and Wife, vol. i. p. 212, 2nd ed.

husband alone may have a *scire facias* without taking out administration (i), for by the judgment the nature of the debt is altered, and it is become a debt due to the husband (k). But if husband and wife obtain judgment for a debt due to the wife as executrix, and then the wife die before execution, the husband cannot have a *scire facias* upon the judgment, because it is a debt due to the wife *en autre droit*, and the right to have execution remains to him who takes out administration to the wife: and if the husband takes out administration to his wife, he has no interest in the debt; for although the husband is party to the judgment, yet he has no property in the debt, and he who ought to have the *scire facias* must have privy and property in the debt in order to have execution (l).

For the recovery of debts due by the wife before coverture, husband must be joined.

With respect to debts due *by* the wife whilst single, and which remained due at the time of the marriage, the husband is liable, and it is but reasonable that the law, which by the marriage gives to the husband all his wife's personal estate in possession, and the power of recovering or disposing of all her personal property in action or in contingency that by possibility may fall into possession during the coverture, should make the husband liable for his wife's debts owing at the period of the marriage. This liability, however, as it originates with the marriage, ceases with it; so that, if the debts be not recovered during its continuance, the husband will be discharged if he survive the wife (m).

And for debts due *by* the wife, and for all actions for which the wife stood attached at the time of the coverture, the action must be joint against them both; for, if she alone were sued, it might be the means of making the husband's property liable without giving him an opportunity of defending himself (n).

And if the wife should die after judgment and before execution, the husband having been joined as a defendant will continue charged; because, as has been already stated, by the judgment,

(i) 2 Tidd's Prac. 8th ed. 1167; *Gabriel Miles' case*, 1 Mod. 179; Com. Dig. tit. Pleader, 3 L. 7; *Butler v. Delt*, Cro. Eliz. 844; *Beaumont v. Long*, Cro. Car. 208; *Obrian v. Ram*, 3 Mod. 189; *Eyres v. Coward*, 1 Sid. 337.

(k) But see *Bond v. Simmons*, 3 Atk. 21; and see 2 V. Wms. Saund. 72 m, n.

(l) 2 Tidd's Prac. 8th ed. 1167; *Beaumont v. Long*, Cro. Car. 208, 227; *Ib. Anon.* 464; 2 V. Wms. Saund. 72 m;

notes to *Underhill v. Devereux*; Roper on Husband and Wife, vol. ii. p. 73; 2nd ed. vol. i. p. 190.

(m) 2 Roper on Husband and Wife, p. 73, 2nd ed.; Roll. Abr. 351. And if the husband die before the debt is recovered, the wife surviving is liable; *Woodman v. Chapman*, 1 Camp. 189.

(n) Bac. Abr. tit. Baron and Feme, L, p. 734; and the coverture may be pleaded in abatement, Com. Dig. tit. Pleader, 2 A, 1.

the nature of the debt is altered, and from that time it becomes his own debt (o).

But, if an action have been commenced *by* or *against* the wife *dum sola*, the defendant in the former case should plead the coverture in abatement; or, if the coverture take place after plea, and before the trial, the defendant should plead it *puis darrein continuance*, otherwise the action may proceed to final judgment, and the wife may sue out execution without making her husband a party to the record by *scire facias* (p); and, in the latter case, the plaintiff may proceed to judgment and execution against the wife without joining the husband by *scire facias*, and a *capias ad satisfaciendum* against her following the judgment is regular, though the plaintiff had notice of the marriage before (q). So, in ejectment against a *feme sole* who married before trial, and afterwards verdict and judgment were given against her by her original name, the Court of King's Bench held that it was regular to issue an *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was inoperative, her money

Where action commenced by or against the wife *dum sola*, *scire facias* not necessary.

(o) *Obrian v. Ram*, 3 Mod. 186; *Eyres v. Coward*, Sid. 337; *Trevillan v. Lawrence*, 2 Ld. Raym. 1050; *Rooper on Husband and Wife*, vol. iii. p. 75.

(p) *Morgan v. Painter*, 6 T. R. 265; *Mary Walker v. Golling*, 11 M. & W. 78; *S. C.*, 2 Dowl. N. S. 776. *Per Parke, B.*: "Suppose you had known of the marriage before plea pleaded, then certainly you must have pleaded it in abatement, and there would be no occasion for a *scire facias*. So, also, if the marriage take place before the trial, the defendant should plead it *puis darrein continuance*." And in delivering judgment in the above case, the same learned judge is reported to have said, "The form of the *scire facias* in the case of husband and wife, as given by Mr. Tidd, after reciting that the wife has obtained judgment, states that *afterwards* she intermarried; that would seem to show that the *scire facias* is necessary only when the marriage takes place after judgment. Where it takes place before the judgment, I think the objection ought

to be taken by plea." The objection was that the husband had not been made a party to the record by *scire facias*, on which ground a rule was obtained to set aside the *feri facias* and all subsequent proceedings in the cause. If the coverture be denied altogether, the defendant has a right to traverse it by a plea in bar; *Chantler and Wife v. Lindsay*, 16 M. & W. 82.

(q) 2 Tidd's Prac. 8th ed. 1166; *Cooper v. Hunchin*, 4 East, 520. *Per Ellenborough, C. J.*: "The execution must follow the nature of the judgment. Whether the husband can bring error or not is another question. But the judgment here being against the *feme* only, the execution can only be against her. If the plaintiff had meant to implicate the husband in the consequences he must have first made him a party by joining him in a *scire facias*." And see *Larkin v. Marshall et Usor*, 1 L. M. & P. 186; *Boans v. Chester*, 2 M. & W. 847; *Beynon v. Jones*, 15 M. & W. 566; *Newton v. Boodle*, 9 Q. B. 948.

and chattels in possession being vested in the husband by her marriage (*r*). So, where a *feme sole* married before declaration, and the plaintiff notwithstanding proceeded to final judgment against her and took her in execution, the Court refused to discharge her, it not having been sworn that she had no separate property (*s*); and the husband must be left to his writ of error. But, if a *feme sole* give a warrant of attorney, it seems her marriage afterwards before judgment is entered up, will be a revocation of it, because it is a charge on the husband; otherwise it is if the warrant of attorney be given to a *feme sole* who afterwards marries, because it is for the husband's advantage (*t*).

Scire facias where a judgment has been obtained by or against a *feme sole* before coverture.

We now come to the class of cases where a judgment has been obtained by or against a *feme sole* who afterwards marries, and in which it is sought by the husband to have execution of the judgment, or by the wife's creditor to have execution against him for the judgment recovered against the wife. In these cases the principle laid down in *Pennoyer v. Brace* (*u*), and already explained (*x*), that "where a new person is either to be better or worse by the execution there must be a *scire facias*, because he is a stranger, to make him party to the judgment" becomes applicable, and a *scire facias* is on that account necessary.

Judgment by the wife.

2. *L. D. C. 6P. 245*.

Thus, if a *feme sole* obtain judgment and she afterwards marry before execution, there must be a *scire facias* for husband and wife in order to execute the judgment (*y*). On this principle it was held, in the case of *Wortley v. Rayner* (*z*), that the husband could not have execution for the costs on a plea of coverture found for his wife, sued as a *feme sole*, without a *scire facias*; it being a maxim that a person not a party to the record cannot be benefited nor charged by the process without a *scire facias*, though the wife might have had process in her own name, because the plaintiff having declared against her as *sole* he was concluded from denying it. So, if final judgment be given against a *feme sole* and

Judgment

(*r*) 2 Tidd's Prac. 8th ed. 1166; 3 M. & Sel. 557, *Doe v. Butcher*.

(*s*) *Evans v. Chester*, 6 Dowl. 140. Where judgment has been obtained against husband and wife, the wife may be taken in execution where she has separate property; see as to this *Chalk v. Deacon and Wife*, 6 J. B. Moo. 128; *Sparkes v. Bell*, 8 B. & C. 1; *Lockwood and another v. Salter and Wife*, 5 B. & Ad. 303; *Hoad et Uxor v. Ma-*

thews, 2 Dowl. 149; *Reg. v. Johnston*, 5 Q. B. 335; *Ferguson v. Clayworth et Uxor*, 6 Q. B. 269.

(*t*) *Anon.* 1 Salk. 117.

(*u*) 1 Salk. 319, 320; 1 Ld. Raym. 245; 2 Ld. Raym. 768.

(*x*) *Ante*, book ii. ch. i.

(*y*) 2 Tidd's Prac. 8th ed. 1166; *Aggasiz v. Palmer*, 6 Scott, N. R. 603; 1 D. & L. 18, S. C.

(*z*) 1 Doug. 637.

she marry before execution, there should regularly be a *scire facias* against the wife. to revive it against her and her husband (a) in order to charge the husband (b); for otherwise, if the wife die before the suing out of execution, the husband will be discharged from the demand (c). If execution be taken out on the judgment without making the husband a party by *scire facias* in order to charge him, it must follow the judgment and be against the wife alone (d); and the *capias* shall be awarded against her only, and not against her husband (e).

In the case of *Woodyer v. Gresham* (f) it was held, that if execution be awarded to the husband and wife on a judgment obtained by the wife *dum sola* for her own proper debt, the husband alone may have a *scire facias* after his wife's death (g); for although the award of execution does not alter the nature of the debt, yet it alters the property and vests it in the husband jointly with his wife, and the debt survives (h). And, in like manner, if judgment be obtained against a feme sole and she marry, and then the plaintiff sue out a *scire facias* against husband and wife and have judgment *quod habeat executionem* against both, and after a year and a day the wife die, the plaintiff may sue out a *scire facias*, and have execution against the husband (i).

But if the husband has not been made party to the judgment by *scire facias* in the lifetime of the wife, he cannot after her death issue a *scire facias* on the judgment (under 8 & 9 Will. III. c. 11, s. 8) to have execution of arrears of an annuity due in her right. Not having been made a party to the record, he can only recover the debt as administrator to his wife (k).

(a) 2 Tidd's Prac. 8th ed. 1166.

(b) *Cooper v. Hunchin*, 4 East, 520. "Because the execution must follow the judgment."

(c) 2 Roper on Husband and Wife, 2nd ed. 73.

(d) *Cooper v. Hunchin*, 4 East, 521; *Thorpe v. Caroline Argles*, 1 D. & L. 831; 3 Bla. Com. 414; *Doyley v. White*, Cro. Jac. 323; Moo. 704; Cro. Car. 513; *Wilkins v. Whétherill*, 3 B. & P. 220; *King and Wife v. Jones*, 2 Stra. 811, and see note (g), ante, p. 159.

(e) 3 Bla. Com. 414.

(f) 1 Salk. 116; Carth. 415; Comb. 455; Skin. 682, S. C.; Bac.

Abr. tit. *Scire Facias*, C, 6.

(g) Where the debt recovered was personalty, a *scire facias* on the death of the wife would seem not to be required, according to the cases, as the husband would be entitled to execution by survivorship. See *Gabriel Nule's case*, 1 Mod. 178; *Obrian v. Ram*, 3 Mod. 189; 2 V. Wms. Saund. 72 l, n.

(h) See 2 Roper on Husband and Wife, 2nd ed. 212.

(i) 2 Tidd. Prac. 1167, 8th ed.; *Obrian v. Ram*, 3 Mod. 186; Carth. 30; Comb. 103, S. C.; 1 Salk. 116.

(k) *Betts, Administrator, v. Kempton*, 2 B. & Ad. 273.

The venue
of the mar-
riage need
not be
alleged.

In a *scire facias* by baron and feme, upon a judgment recovered by the feme *dum sola*, the plaintiffs should state their marriage, though they need not allege it with a venue, that being only matter of surmise to which no venue is necessary (1).

See references to the forms, *post*, Append. (m).

(1) 2 Tidd's Prac. 2nd ed. p. 1167 ; v. *Garay and another*, 7 T. R. 243.
Blake v. Astrill, 2 Stra. 775 ; 2 Ld. (m) See Chitty's Forms, 6th ed. p.
 Raym. 1504, S. C. ; 1 Barnard. K. B. 478.
 16 ; 2 H. Bla. 145 ; *Neal and others*

CHAPTER IV.

SCIRE FACIAS IN CASES OF BANKRUPTCY OR INSOLVENCY.

Effect of 6 Geo. IV. c. 16, p. 163.

— 1 & 2 Will. IV. c. 56,
p. 164.

*Provisions of the Bankrupt Law
Consolidation Act, 12 & 13 Vict.
c. 106, s. 141, p. 164.*

*Scire Facias by Assignees on an
Interlocutory Judgment, p. 166.*

*Assignees cannot make themselves
Parties to the Record, till after
Judgment, p. 166.*

*Scire Facias to make Assignees
Parties to the Record, where
Judgment obtained by Bankrupt
or in his Name, p. 167.*

*Scire Facias by Assignees, to recover
Money in Sheriff's Hands, levied
on Judgment Debt of Bankrupt,
p. 167.*

Bankrupt a Trustee for his As-

signees, p. 168.

*Scire Facias against Bankruptcy
Commissioner, to enforce Per-
formance of Order of Court of
Review, p. 168.*

Amendment of Scire Facias, p. 168.

Costs on " p. 168.

Practice on " p. 169.

*Effect of Provisions of Acts rela-
ting to Insolvents. 1 & 2 Vict.
c. 110, p. 170.*

— 5 & 6 Vict. c. 116, p. 171.

— 7 & 8 Vict. c. 96, p. 171.

*Practice as to Scire Facias in Cases
of Bankruptcy and Insolvency,
the same, p. 172.*

*Scire Facias in Case of a Bankrupt
Joint-stock Company, p. 172.*

*No Scire Facias necessary against
future Effects of Insolvent, p. 172.*

IN treating of the writ of *scire facias* in cases of bankruptcy and insolvency, when required to have execution on a judgment obtained by a bankrupt or insolvent prior to his bankruptcy or insolvency, the right to have the fruits of which has vested in the bankrupt's or insolvent's assignees, it will be advisable to consider the various statutes affecting each separately.

Formerly by the 6 Geo. IV. c. 16, s. 63, the commissioners of Effect of 6
bankruptcy were to assign to the assignees for the benefit of the Geo. 4, s.
16.
creditors of the bankrupt "all debts due or to be due to the
bankrupt wherever the same might be found or known," which
assignment vested the property, right, and interest in such debts
in such assignees, and after such assignment neither the bank-
rupt nor any person claiming through or under him had power to
recover, or to release, or discharge the same, and the assignees
had the like remedy to recover the same in their own names as

1 & 2 Will.
4, c. 56.

Provisions
of the Bank-
rupt Law Con-
solidation Act,
12 & 13
Vict. c. 106,
s. 141.

the bankrupt himself had before his bankruptcy. By the 1 & 2 Will. IV. c. 56, ss. 25 and 26, there was a similar provision, vesting all the personal and real estate and effects, present and future, of any person adjudged a bankrupt in the assignees of such bankrupt for the time being by virtue of their appointment (a). And now by the Bankrupt Law Consolidation Act (b) it is enacted, "That when any person shall have been adjudged a bankrupt (c), all his *personal estate* (d), *effects, present and future*, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate, and *all debts due or to be due to him wheresoever the same may be found or known, and the property, right, and interest in such debts shall become absolutely vested in the assignees for the time being for the benefit of the creditors of the bankrupt by virtue of their appointment*, and after such appointment neither the bankrupt nor any person claiming through or under him shall have power to recover the same, nor to make any release or discharge thereof; neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the City of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt himself might have had if he had not been adjudged bankrupt."

(a) See 1 Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 421. It is a general rule, that every *chase in action* accruing in respect of a bankrupt's estate, whether complete or merely inchoate, and whether sounding in debt or damages, (*Porter v. Varley*, 9 Bing. 93; *Wright v. Fairfield*, 2 B. & Ad. 727,) in which the bankrupt had both the legal and beneficial interest, passes to the assignees, and that wherever it does so pass they are the only parties who can sue, Lush's Prac. 43. And see *post*, p. 171, 7 & 8 Vict. c. 96, s. 4, in which all the "property" of a bankrupt is said to vest in the assignees, which term in section 13 seems to include *choses in action*; and see *Herbert v. Sayer*, 2 D. & L. 57. Every matter whereof profit may be made belonging to the bankrupt vests in the assignees (*Drake*

v. Beckham, 11 M. & W. 315; *Smith v. Coffin*, 2 H. Bla. 451; *Raymond v. Fitch*, 2 C. M. & R. 588); debts due to the bankrupt, and the damages to be recovered by him for the breach of contracts relative to the bankrupt's personal estate and which affect its value, pass as personal estate to the assignees, *Hill v. Smith*, 12 M. & W. 630.

(b) 12 & 13 Vict. c. 106, s. 141.

(c) As to which see ss. 101, 211.

(d) The words "personal estate" include all *choses in action*, trespass for injury to property, real or personal, trover for goods, &c., actions on contracts (if the assignees choose to adopt them), and all actions for an injury to the property of the bankrupt, which has had the effect of deteriorating its value in the hands of the assignees, *Archbold's Bankrupt Law Consolidation Act*, p. 30.

Section 142 vests all the bankrupt's real estate, present and future, in the assignees in the same manner by virtue of their appointment.

Section 155 discharges any debtor who pays any debt claimed by the assignees of a bankrupt from all demands or claims which may be made in respect of the same by any person adjudged a bankrupt or claiming under him, even although the fiat be afterwards superseded, or the adjudication of bankruptcy, or petition for adjudication, be afterwards annulled or dismissed.

All actions, therefore, for the recovery of debts due to the bankrupt brought after his bankruptcy must be commenced by and in the name of his assignees, and by section 153 of the Bankrupt Law Consolidation Act this must be "with the leave of the Court first obtained, upon application to such Court, but not otherwise." And though the bankruptcy of the plaintiff after action brought has been held not to be an abatement of the suit (*e*), and the action may be continued by the assignees in the name of the bankrupt (*f*), yet the plaintiff by becoming bankrupt has disabled himself from continuing the suit, and his bankruptcy, if pleaded in bar to the further maintenance of the action, or *purs darrein continuance*, is a good defence (*g*), for where a defendant has a day in Court to plead and the means likewise of pleading the plaintiff's bankruptcy the Court cannot refuse to give effect to a legal defence of this nature (*h*).

The safest course therefore, in such a case, would be to discontinue the proceedings in the name of the bankrupt, and for the assignees to bring a fresh action in their own names (*i*); for, if the defendant plead the bankruptcy, the plea will be good, notwithstanding the plaintiff reply that the proceedings are continued by the assignees in the name of the plaintiff for the use and benefit of the plaintiff's creditors, and not for the use of the

(*e*) *Kretchman v. Beyer*, 1 T. R. 463; *Wagh v. Austen*, 3 T. R. 437; *Hewit and others, Assignees, v. Mantel*, 2 Wils. 372; *Andrews v. Palmer*, 4 B. & Al. 252.

(*f*) *Garne v. Carroll*, 1 B. & Ad. 459, per Lord Tenterden, C. J.: "I think that the plaintiff must be considered as a trustee for the assignee, and the other creditors, and that what he recovers in the suit is received for their benefit."

(*g*) *Swan v. Sutton*, 10 Ad. & El.

631; per Littleale, *J. Biggs v. Cox*, 4 B. & C. 920; *Brotherton v. Osborne*, 1 Dowl. P. C. 457; *Kinnear v. Farrant*, 15 East, 622; *Dunn v. Hill*, 11 M. & W. 470; 2 Dowl. N. S. 1062, *S. C.*

(*h*) 1 Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 805, and cases cited in last note.

(*i*) Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 806; *Barnes v. Maton*, cited 15 East, 631; 1 Chitty on Pleading, 6th ed. 23; *Biggs v. Cox*, 4 B. & C. 920.

plaintiff (*k*). In one case however, where the parties were at issue and notice of trial had been given, and the plaintiff before trial became a bankrupt, the Court upon motion permitted the trial to go on in the name of the bankrupt upon the assignees undertaking to pay the costs of suit in case a verdict should be given for the defendant (*l*), and this course has since grown into practice (*m*); but the defendant's right to plead the plaintiff's bankruptcy in bar to the further maintenance of the action remains untouched by it (*n*).

Where however the defendant has no day in Court in which to plead the plaintiff's bankruptcy—as where the plaintiff had obtained interlocutory judgment before his bankruptcy—it has been held that the action was rightly continued in the bankrupt's name during the execution of the writ of inquiry, and until final judgment, because “after the interlocutory judgment the defendant had no day in Court, nor could he afterwards plead anything to the action. The taking the inquisition and entering final judgment were only the conclusion and necessary consequence of the interlocutory judgment; for the Court themselves, if they had so pleased, might upon the interlocutory judgment have assessed the damages, and thereupon given final judgment before the plaintiff became bankrupt; and the inquisition is only a matter of course, taken to inform the conscience of the Court” (*o*).

Scire facias
by assignees on
an interlocutory
judgment.

It was also held in the same case that there was no doubt but that the assignees might issue a *scire facias* on the judgment so obtained to have execution of it (*o*).

Assignees
cannot
make them-
selves parties
to the
record till
after judgment.

So, where the plaintiff has become bankrupt after final judgment and pending a writ of error, his assignees must proceed to final judgment or affirmance in the bankrupt's name (*p*); the rule being that the assignees cannot make themselves parties to the record in any intermediate stage of the proceeding, but it must be immediately after judgment, though an interlocutory judgment is sufficient for that purpose (*q*).

We have now traced the proceedings up to that point when the

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| <p>(<i>k</i>) <i>Kinnear v. Tarrant</i>, 15 East, 624.
 (<i>l</i>) <i>Priddle v. Thomas</i>, cited 2 Wils. 373.
 (<i>m</i>) <i>Heaford v. Knight</i>, 2 B. & C. 579; 4 D. & R. 81, S. C.; <i>Doyle v. Anderson</i>, 2 Dowl. P. C. 596.
 (<i>n</i>) <i>Swan v. Sutton</i>, 10 Ad. & El.</p> | <p>630, per Lord Denman, C. J.
 (<i>o</i>) <i>Hewett and others, Assignees, v. Mantel</i>, 2 Wils. 372, 358; and see <i>Monke v. Morris and another</i>, 1 Mod. 93.
 (<i>p</i>) 2 Tidd's Prac. 1167, 8th ed.
 (<i>q</i>) <i>Kretchman v. Beyer</i>, 1 T. R. 463; 2 V. Wms. Saund. 72 n.</p> |
|--|---|

assignees must sue out execution on a judgment obtained in the name of a bankrupt after his bankruptcy, or by a bankrupt before his bankruptcy, on which execution has not been issued before his bankruptcy, and where the principle laid down in *Penoyer v. Brace* (r) applies, that "where a new person is to be benefited or charged by the execution of a judgment there ought to be a *scire facias* to make him a party to the judgment."

After judgment therefore has been obtained by the bankrupt, or in his name by the assignees, whether interlocutory (s) or final, the assignees may make themselves parties to the record in order to have execution of the judgment by suing out a *scire facias ad inquirendum* or *quare executionem non*, as the case may be.

Scire facias to make assignees parties to the record where judgment obtained by bankrupt or in his name.

So where a recognizance was entered into by bail in an action it was held, on judgment having been obtained by the plaintiff, and on his subsequently becoming bankrupt before execution, that the assignees might sue out a *scire facias* on the recognizance against the bail (t).

Where the bankrupt had recovered damages in an action on the case for words spoken of his wife, and after the sheriff had levied the amount under an execution against the defendant, and before he had returned the writ, the plaintiff became a bankrupt, and the judgment debt, and costs were assigned to assignees, and the sheriff instead of paying the money over to the bankrupt brought it into Court; it was held that the assignees were not entitled to the money on the ground of its having been levied before the bankruptcy and not paid to the bankrupt, and that it was therefore not his; that after the bankruptcy it was in *custodia legis*, and could not be assigned; and that as it was levied by record it could only be delivered to him who was able to acknowledge satisfaction of record, which the assignees (being strangers to the record) could not do. The money was therefore ordered to be delivered to the bankrupt (u).

Judgment debt levied before bankruptcy and in hands of sheriff.

Where a plaintiff after judgment became bankrupt and afterwards sued out execution, and the money was levied by the sheriff and brought into Court, the Court refused upon motion of the assignees to order the money to be paid to them, but consented to

Scire facias by assignees to recover money in sheriff's hands, le-

(r) 1 Salk. 319; *ante*, book ii. ch. i. p. 1; 2 Tidd's Prac. 8th ed. 1166.

(s) *Hewett and others, Assignees, v. Mantel*, 2 Wils. 372; *Kretchman v. Beyer*, 1 T. R. 463; Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 806.

(t) *Fletcher v. Pogson*, 3 B. & C. 192; see also *Swan v. Sutton*, 10 Ad. & El. 623.

(u) *Benson v. Flower*, Cro. Car. 166, 176; Sir W. Jones, 215; Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 425.

vied on
judgment
debt of
bankrupt.

detain the money that the assignees might recover it by issuing a *scire facias* against the defendant to try the bankruptcy and prove their title (x).

But in the case of *Plummer v. Lea* (y), where a plaintiff had obtained judgment on a *scire facias*, and afterwards became bankrupt, the Court on motion dispensed with a fresh *scire facias* by the assignee, and allowed a suggestion to be entered on the record to enable him to issue execution. This decision, however, seems contrary to principle, and to the decisions in the analogous cases of death and marriage of a feme sole, after judgment obtained.

Bankrupt
a trustee
for his
assignees.

The Court, however, in one case, where execution was taken out in the name of the bankrupt without a *scire facias* being sued out by the assignees to make them parties to the record, refused to set aside the proceedings for irregularity, on motion (z); and this case was acted on in *Guinness v. Carroll* (a); Lord Tenterden, in his judgment in that case, saying, that the plaintiff (the bankrupt) "must be considered as a trustee for the assignee and the other creditors, and that what he recovered in the suit was received for their benefit" (b).

The safer and regular course appears to be, however, to make the assignees parties to the record, in order to enable them to issue execution on the judgment (c).

Scire facias
against
bankruptcy
commissioner
to enforce per-
formance of
order of
Court of
Review.
Amend-
ment of
scire facias.

If a bankruptcy commissioner were to refuse to execute an order of reference from the Court of Review, directing him to inquire into any matters relating to the bankruptcy, and to report the same to the Court, it seems that a *scire facias* may issue against him to enforce the performance of the order (d).

The Courts have allowed a *scire facias*, by assignees, to revive a judgment obtained by the bankrupt before his bankruptcy to be amended on payment of costs even after issue has been joined, by inserting the name of the official assignee, liberty being given to the defendant to plead *de novo* (e).

Costs on.

If a judgment recovered before the bankruptcy be revived by *scire facias* after the bankruptcy, it has been decided that the

(x) *Monke v. Morris and another*, 1 Mod. 93; Vent. 193.

(y) 5 Mod. 88.

(z) *Waugh v. Austen*, 3 T. R. 437; and see *Ouchterlony v. Gibson*, 6 Scott, N. R. 577, 581.

(a) 1 B. & Ad. 459.

(b) See *Winch v. Keeley*, 1 T. R. 619.

(c) See note (z) to Chitty's Arch.

Prac. 8th ed. 1021.

(d) Deacon and De Gex's Law and Practice of Bankruptcy, 2nd ed. 156; *Ex parte Steward*, 3 M. D. & D. 405; *Ex parte Rolfe*, 2 Dea. 421; 5 Com. Dig. tit. Officer, K, 11.

(e) 2 P. & D. 336; *Holland v. Phillips*, 10 Ad. & El. 149, S. C.

bankrupt's certificate delivers him from the costs of the *scire facias*, as well as from the original judgment. So if a writ of error be brought after the bankruptcy to reverse a judgment against the bankrupt before his bankruptcy, and the judgment be affirmed, and the plaintiff issue a *scire facias* to enable him to reap the fruits of his judgment, the certificate which discharges the bankrupt from his original debt also discharges him from the costs of prosecuting the writ of error, and from the costs of the *scire facias*; as all the proceedings subsequent to the judgment spring out of the original debt, which is the substratum of the whole, and from which the certificate discharges the bankrupt (*f*). But it does not follow that the costs of the *scire facias* which have been incurred by the act of the creditor in reviving the judgment can be proved under the fiat (*g*); it would, however, seem unreasonable if the costs have been incurred by any act of the bankrupt, that the bankrupt should be discharged from them, and the plaintiff be at the same time unable to prove them under the fiat (*h*).

It has been decided in a recent case—where a plaintiff recovered a verdict in an action of assumpsit for damages and costs, and after a fiat in bankruptcy had issued against the defendant, signed judgment, and afterwards proved the amount of the judgment debt under the commission, the bankrupt commissioners refusing to allow him to prove for the costs, judgment having been signed after the bankruptcy, and where no dividend was paid, nor did the bankrupt obtain his certificate—that the proof under the commission was an abandonment of the action under the 59th sect. of the 6 Geo. IV. c. 16, and the plaintiff could not therefore revive the judgment by *scire facias* in order to recover the costs. The Court of Queen's Bench accordingly granted a rule to stay proceedings on the *scire facias* (*i*).

It was formerly held to be sufficiently certain if the *scire facias* Practice on by the assignees stated generally that the bankrupt creditor, after judgment recovered, became bankrupt within the true intent and meaning of the statutes, &c., and that his goods and effects were afterwards in due manner assigned to the plaintiffs as his assignees, without alleging that the plaintiff was declared a bankrupt, or how his effects were assigned (*k*). So a declaration in *scire*

(*f*) *Phillips v. Brown*, 6 T. R. 282;
Blandford and others v. Foote, Com.
138; *Hurst v. Mead*, 5 T. R. 365;
Watts v. Hart, 1 B. & P. 134.

(*g*) *Deacon and De Gex's Law and*
Prac. of Bankruptcy, 2nd ed. p. 301.

(*h*) *Ibid.*

(*i*) *Woodward and another v. Meredith*, 2 D. & L. 135; *Harley and another v. Greenwood*, 5 B. & Al. 95.

(*k*) *Winter v. Kretchman*, 2 T. R. 45.

facias by assignees of a bankrupt, averring his bankruptcy within the true intent and meaning of the several statutes, &c., and that a commission of bankrupt was duly awarded and issued against him, and that the plaintiffs were duly chosen assignees of his estate and effects under the said commission, and concluding with the prayer that execution may be adjudged to them "as assignees as aforesaid," was held sufficient on general demurrer, without stating that an assignment of the estate and effects of the bankrupt was made to the plaintiffs (*l*). But now, by the Bankrupt Law Consolidation Act (*m*), "all the personal estate and effects of the bankrupt, present and future," and all debts due and to be due to him, and the property, right, and interest in such debts, vest in the assignees by virtue of their appointment, and no deed of assignment of the bankrupt's estate and effects is required.

If a bankrupt recover judgment, and afterwards sue out a *scire facias* to have execution, the defendant cannot plead the plaintiff's bankruptcy in bar of the action, if it occurred before judgment recovered, as he might have pleaded it to the original action, and such a plea to a *scire facias*, which does not aver with certainty whether the plaintiff became bankrupt before or after judgment recovered, is bad (*n*). Though such a plea, if sufficiently pleaded, where the bankruptcy has occurred after the judgment was recovered, would, it seems, be a good bar to the plaintiff's right to have execution on the judgment (*o*).

We now come to consider the effect of the statutes relating to insolvent debtors, and the mode of recovering judgment debts due to insolvents.

Effect of provisions of acts relating to insolvents, 1 & 2 Vict. c. 110.

By the 1 & 2 Vict. c. 110, s. 35, a prisoner for debt petitioning the Insolvent Court to be discharged, and in his petition stating his willingness that all his real and personal estate and effects shall be vested in the provisional assignee for the time being of the estate and effects of insolvent debtors; or by sect. 36, on any creditor of such person so applying (where the debtor, after being imprisoned twenty-one days, shall not have satisfied his creditors),—by sect. 37, all the real and personal estate and effects of such

(*l*) *Fletcher v. Pogson*, 3 B. & C. 192.

(*m*) *Ante*, p. 164.

(*n*) *Bylis v. Hayward*, 4 Ad. & El. 256.

(*o*) But see *Drayton and another v. Dale*, 2 B. & C. 293; where held that property acquired by a bankrupt sub-

sequently to his bankruptcy, does not absolutely vest in the assignees, although they have a right to claim it; but if they do not make any claim, the bankrupt has a right to such property against all other persons; and see *Taylor v. Buchanan*, 4 B. & C. 419; *Lee v. Telfer*, 1 Car. & P. 146.

prisoner (excepting his wearing apparel and tools and implements of trade, not exceeding 20*l.* in value), and all property to which he may become entitled before his final discharge, and *all debts due or growing due to such prisoner*, or to be due to him before such discharge, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England.

By the Act for the Relief of Insolvent Debtors, the 5 & 6 ^{5 & 6 Vict. c. 116.} Vict. c. 116, s. 1, upon the presentation of the petition of an insolvent (*p*), for protection from process, to the Court of Bankruptcy, (if he have resided twelve calendar months in London, or to the commissioners of bankrupt in the country within whose district he may have resided twelve calendar months,) with a true schedule and description of his debts annexed, it shall be lawful to a judge of the Court of Bankruptcy, or for such commissioner in the country, to give a protection to the petitioner from all process against either his person or his property, and all the estate and effects of the petitioner shall forthwith become *vested* in the official assignee, who shall be nominated by the commissioners acting in the matter of the said petition; and such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit. By sect. 7, on the passing of the final order, the petitioner's whole estate and credits vest in the assignees chosen by the creditors; and by sect. 9, the insolvent's assignees shall be entitled to claim and demand from him, at any time after the passing of the final order for his protection, any estate and effects acquired by him, *at any time after such order shall have been made*, and all such estate and effects vest in them upon their filing a copy of their claim, served upon the insolvent; but no assignee shall be authorized to take possession of any such estate and effects, except under the authority of a commissioner, or of the Court of Review in Bankruptcy, to the extent that they may order.

And by sect. 4 of the 7 & 8 Vict. c. 96 (*q*), it is enacted, "that ^{7 & 8 Vict. c. 96.} the *property* of the petitioner shall, for the purposes of the said recited Act (5 & 6 Vict. c. 116), and of this Act, vest in the assignee or assignees for the time being, by virtue of the appointment of such assignee or assignees." "Provided always, that the

(*p*) *I. e.*, "of a person not being a trader within the meaning of the statutes now in force relating to bankrupts, or being such trader, but owing debts amounting in the whole to less than 300*l.*"

(*q*) "An Act to amend the Law of Insolvency, Bankruptcy, and Execution."

property of the petitioner shall, in every case, be possessed and received by the official assignee alone, save where it shall be otherwise directed by the commissioner."

Sect. 11 vests all powers which the petitioner could legally execute for his own benefit in his assignees, and sect. 13 enables the assignees to sue in their own names for the recovery of any rights or property of the petitioner.

Practice as to *scire facias* in cases of bankruptcy and insolvency the same.

On these statutes the practice as to issuing a *scire facias* by the assignees, to make themselves parties to a record, to have execution of a judgment previously obtained by an insolvent, appears to be the same as in the case of bankruptcy (*r*); and most of the decisions relative to actions by the assignees of a bankrupt are applicable to actions by the assignees of an insolvent debtor (*s*).

In *Williams v. Chambers* (*t*) it was decided that the value of the personal labour of an insolvent, after the vesting order by the Court, does not pass to the assignee appointed under the provisions of the 1 & 2 Vict. c. 110, s. 87, as he cannot let the insolvent out to hire and contract for his personal labour.

Scire facias in case of a bankrupt joint-stock company.

Where a joint-stock company has become bankrupt, and its affairs are being wound up under the provisions of the 7 & 8 Vict. c. 111, 9 & 10 Vict. c. 28, and 11 & 12 Vict. c. 45, a *scire facias* would seem to be necessary, to enable the "official manager" appointed under sects. 20 and 22 of the latter statute (in whom, on his appointment, the estate, effects, credits, and rights of action vest, by virtue of his appointment (*u*),) to have execution of a judgment already obtained by the bankrupt company, and to which the "official manager" was no party (*v*). But it does not appear to be yet settled in what manner the Courts will allow an unpaid creditor of such a company to issue execution against the persons liable to contribute, should he be unable to obtain satisfaction of

(*r*) Chitty's Arch. Prac. 8th ed. 1021.

(*s*) 1 Chitty's Plead. 6th ed. 27; *Swan v. Sutton*, 10 Ad. & E. 625.

(*t*) 10 Q. B. 340; and see *Chipendale v. Tomlinson*, 4 Doug. 318; 1 Cook's Bank. Laws, 342; *Hesse v. Stevenson*, 3 B. & P. 565, 578; *Ex parte Walters*, 2 M. D. & De Gex, 635.

(*u*) Sects. 29 and 30.

(*v*) *Sed quære*, whether a suggestion would not be sufficient, the "official

manager" being but a nominal party; see *ante*, pp. 104, 116; and *Bosquet v. Ranford*, 11 Ad. & E. 520; *Webb, P. O., v. Taylor*, 1 D. & L. 676; and *Barnewall, P. O., v. Sutherland*, 1 L. M. & P. 159. And although the "official manager," would be a "new party" on the record, yet he would "neither derive a benefit by, nor become chargeable to the execution," within the terms of the rule laid down in *Penoyer v. Brace*, see *ante*, p. 99.

his debt from the fund of the contributories vested in the Master in Chancery (w).

It has been seen that, under the 87th sect. of the Insolvent Act (x), no *scire facias* is necessary to revive the judgment on the warrant of attorney executed by an insolvent before adjudication. Under that section of the statute execution may at all times issue thereon, by virtue of the order of one of the superior Courts in which such judgment shall have been entered up, "if it shall appear, to the satisfaction of the said Court, that such prisoner [insolvent] is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose," for "such sum as, under all the circumstances of the case, the said Court shall order; such sum to be distributed rateably amongst the creditors" (y).

No *scire facias* necessary against future effects of insolvent.

For references to the forms, see *post*, Appendix (z).

(w) See *ante*, p. 153; and *Thompson v. The Universal Salvage Company*, 3 Exch. 318.

(y) See *ante*, book i. ch. vii. p. 88.

(x) And see forms, *Tidd's Forms*, 6th ed. 545.

(z) 1 & 2 Vict. c. 110.

CHAPTER V.

OF SCIRE FACIAS IN CASE OF THE DEATH OF ONE OF SEVERAL PLAINTIFFS OR DEFENDANTS, AND ALSO IN THE CASE OF THE DEATH OF A SOLE PLAINTIFF OR DEFENDANT.

Of the Necessity of issuing a Writ of Scire Facias in case of the Death of a Plaintiff or Defendant in an Action, in order to have Execution of the Judgment, p. 175.

Of the Doctrine of Survivorship where there are several Plaintiffs or Defendants, and one dies, p. 175.

Arrangement of the Subject of the Chapter, p. 176.

Where one of several Plaintiffs or Defendants has died pending a Suit, p. 176.

Scire Facias on the Death of one of several Plaintiffs or Defendants not necessary in a Personal Action, p. 177.

The Doctrine of Survivorship does not apply to Real Estate. Scire Facias therefore necessary in such Cases, p. 178.

Scire Facias against Survivor and Heir, and Terretenants of Lands, p. 179.

Where a sole Plaintiff or Defendant has died pending a Suit, p. 179.

The Stat. 17 Car. II. is not confined to Actions which would have survived to the Personal Representative, p. 180.

Nor does it apply to Cases of Non-suit, p. 180.

Where the Death of the Plaintiff or Defendant happens before Verdict and after the Assizes begin, p. 181.

Where the Death of the Plaintiff or Defendant happens after Verdict and before Judgment, p. 183.
Entering Judgment nunc pro tunc, p. 184.

When the Death of the Plaintiff or Defendant happens before Interlocutory Judgment, p. 186.

When the Death of the Plaintiff or Defendant happens after Interlocutory and before Final Judgment, p. 186.

Form of the Writ, p. 187.

When two Writs of Scire Facias necessary, p. 188.

What the Executor may plead, p. 189.

Where a sole Plaintiff or Defendant has died after Final Judgment and before Execution, p. 189.

Scire Facias by Administrator durante minore Ætate of an Executor, p. 191.

No Scire Facias necessary where the Death of the Judgment Creditor happens after the Debtor is charged in Execution, p. 192.

Where the Defendant seeks to obtain his Discharge as an Insolvent, the Plaintiff having died, p. 193.

Writ of Execution issued in the Lifetime of the Judgment Creditor valid after his Death, p. 193.

Of Scire Facias against an Executor, p. 193.

Declaration by Executors and Administrators, p. 194.

What may be pleaded by them, p. 194.

Evidence under Plea of plene administravit, p. 195.

The Scire Facias must pursue the Terms of the Judgment, p. 196.

Where the Executor or Administrator of a sole Plaintiff or De-

fendant has died, after Judgment by or against the Testator or Intestate and before Execution, p. 198.

Of Administration de Bonis non, p. 198.

Scire Facias against Administrator de Bonis non, p. 198.

THE necessity or otherwise of issuing a writ of *scire facias* in case of the death of a plaintiff or defendant in an action, depends in some cases upon statutory enactments, which prevent the suit from abating (*a*); and in all cases, when necessary, upon the general rule of law which has been already set forth in the first chapter of the second book (*b*), "that in all cases where a new person, who was not a party to a judgment or recognizance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment" (*c*). In the case of the death, therefore, of a *sole* plaintiff or defendant, after judgment interlocutory or final, the legal representatives of such plaintiff or defendant, deriving a benefit by, or becoming chargeable to the judgment, being strangers to the record, require a *scire facias* to issue, to make them privy to the judgment (*d*), in order that the execution by which they are to be benefited or charged, may be warranted by the judgment (*e*), and that the record may be consistent with itself. Where there are *several* plaintiffs or defendants in a personal action, and one of them dies after judgment, and before

Of the necessity of issuing a writ of *scire facias* in the case of the death of a plaintiff or defendant in an action in order to have execution of the judgment.

Of the doctrine of survivorship

(*a*) See 8 & 9 Will. III. c. 11, s. 6, *post*, 186.

(*b*) *Ante*, p. 99.

(*c*) Viner's Abr. tit. Execution, P. a. "If a man recovers debt or damages by judgment, and dies before execution, his executors shall not have execution by *fieri facias* or *capias*, though it be within the year, but ought to have a *scire facias*." 2 V. Wms. Saund. 6, n. 1; *Penoyer v. Brace*, 1 Salk. 319; and see note (*b*), *ante*, ch. i. book ii. p. 99; 2 Inst. 471; Bac. Abr. tit. Scire Facias, C, 4.

(*d*) And see *Penoyer v. Brace*, 1 Ld. Raym. 245.

(*e*) *Howard v. Pitt and others*, 1 Shower, 405. "Here is one dead; here is an alteration of the parties;

the nature of the execution is changed; for they ought to pursue their judgment; every execution ought to follow the record, and the writ must agree with it, otherwise it is illegal; and so are all the books; 2 Keb. 307; Sid. 351; 1 Keb. 92, 123; Viner's Abr. tit. Execution, P. a; *Reg. v. Ford and others*, 2 Ld. Raym. 768. "When the parties to a judgment or conviction are changed, execution ought not to be sued, without a *scire facias*." In 2 Inst. 471, "No execution, if the parties be altered, without *scire facias*, whether on the plaintiff or defendant's part." *Ante*, n. (*b*), p. 99. "In personal actions, if the plaintiff or defendant die within a year and a day, there cannot be an execution before a *scire facias* by

where there are several plaintiffs or defendants, and one dies.

Arrangement of the subject of the chapter.

execution, there the doctrine of survivorship applies, and the survivors become chargeable to, or benefited by the execution (*f*); and by statutory enactment (*g*) the writ or action is not abated by such death, but the death may be suggested on the record. In the latter case, therefore, a writ of *scire facias* is not necessary.

In treating, however, of the necessity and application of the writ of *scire facias* on the death of a party to an action, it will be advisable to consider each branch of the subject separately. It is proposed, therefore, to consider first, the case, where one of several plaintiffs or defendants has died pending the suit: and secondly, where a sole plaintiff or defendant has died pending the suit. The latter case may, for convenience, be divided—first, into those cases where the plaintiff or defendant has died *before* final judgment; and, secondly, where the plaintiff or defendant has died *after* final judgment.

Where one of several plaintiffs or defendants has died pending a suit.

And first, of those cases where one of several plaintiffs or defendants has died pending the suit. Formerly, at common law, in all actions where there were two or more plaintiffs or defendants, the death of one of them, pending the suit, before final judgment, was an abatement of the action (*h*); although the doctrine of survivorship applied to the cause of action (*i*). But now, by the stat. 8 & 9 Will. III. c. 11. s. 7, it is enacted, "that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but

or against the executor or administrator. Com. Dig. tit. Pleader, 3 L, 1.

(*f*) "It is not necessary to issue a *scire facias* where no alteration of parties is made; as if one plaintiff dies after judgment, execution may be sued in the name of both without a *scire facias*." Com. Dig. tit. Pleader, 3 L, 2; Noy, 150. "If there be two plaintiffs in a personal action, and one of them dies, that shall not put the other to a *scire facias*; or if one of the defendants die, therefore, likewise a *scire facias* is not necessary, because the same party still remains on record;" Moore, 367; *Withers v. Harris*, 7 Mod. 68.

(*g*) 8 & 9 Will. IV. c. 11, s. 7; and see *Rolt v. The Mayor of Gravesend*, 7 C. B. 777.

(*h*) 2 V. Wms. Saund. 72 k, n.;

Leigh and another v. Bargany, Cro. Jac. 19; *Anon.* Cro. Car. 509; and to the same effect see *The King v. Sir John Dryden and others*, Cro. Car. 574; *Capel v. Saltonstall*, 3 Mod. 249; Stra. 1063; and see Com. Dig. H, 33 & 35, tit. Abatement.

(*i*) As in personal actions, Co. Litt. 198. a.: "Where damages are to be recovered for a wrong done to tenants in common or parceners in a personal action, and one of them die, the survivor of them shall have the action;" *Young v. Woolaston*, Hardr. 113; Lush's Prac. 53, 145; V. Wms. Saund. 72 k, n.; *Hill v. Tempest and another*, Cro. Eliz. 145; *Bennion v. Watson and another*, Cro. Eliz. 625; *Rigley v. Lee and Wife*, Cro. Jac. 356; *Griffin v. Lawrence*, Moore, 469.

such death being suggested on the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants." If the death should happen before declaration, it is usually suggested at the commencement of it (k).

If the death happen after declaration, and before issue joined, it should be suggested in making up the issue, but otherwise it is not necessary to suggest it till the plea roll be made up (l). If the death happen before interlocutory judgment, the plaintiff may suggest the death of his co-plaintiff on the roll (m). The execution in such case should be taken out in the joint names of all the plaintiffs or defendants; otherwise, it will not be warranted by the judgment (n). Although the execution on a joint judgment must be joint, yet it may be levied upon one only, and he may have contribution against the others (o); but it should be executed against the survivor or survivors only (p). Where one of several plaintiffs or defendants in a personal action dies after judgment, and before execution, execution may be had by or against the survivor or survivors, within a year after the judgment, without issuing a *scire facias* (q).

Scire facias on death of one of several plaintiffs or defendants not necessary in a personal action.

Thus where the plaintiff sued two defendants, against one of whom he proceeded to outlawry, and the other died after interlocutory, and before final judgment, it was held that the plaintiff could not proceed on the 6th sect. of this statute (r), against the

(k) 2 Tidd's Prac. 8th ed. 1170.

(l) 2 V. Wms. Saund. 72 k; *Far v. Deas*, 1 Burr. 362. Ejectment against two; one died after issue joined, but before trial; the death must be suggested on the roll; *Barnes*, 469; 2 Tidd's Prac. 8th ed. 782, 1170.

(m) *Neunham v. Law*, 5 T. R. 577; where one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both. After this, and after a motion to set aside the proceedings for this irregularity, the Court permitted the plaintiff to suggest the death of the other before interlocutory judgment on the roll, and to amend the *ca. sa.* without paying costs, Lord Kenyon, C. J., saying, "The objection should not have been taken by the defendant at all; the plaintiff might have made

the suggestion as a matter of course."

(n) *Penoyer v. Brace*, 1 Ld. Raym. 244; 1 Salk. 319, S. C.; 2 Tidd's Prac. 8th ed. 1171; 1 Wms. on Exec. 4th ed. 769; *Roll v. The Mayor of Gravesend*, 7 C. B. 777.

(o) 2 V. Wms. Saund. 72 l, n. to *Underhill v. Devereux*; Bro. Execution, 10; *Herries v. Jamieson*, 5 T. R. 556, per Kenyon, C. J.

(p) 2 Chit. Arch. Prac. 8th ed. 1019.

(q) 2 Tidd's Prac. 8th ed. 1171; 1 Wms. on Exec. 4th ed. 769; *Isam's case*, Moore, 367; *Withers v. Harris*, 7 Mod. 68; Noy, 150; *Howard v. Pitt*, 1 Show. 402. At common law the charge upon a judgment being personal survived, Bac. Abr. Execution, G, 1.

(r) See *post*, p. 186.

executors of the deceased; for, notwithstanding the outlawry, the action remained joint, and survived against the other defendant (s).

There being no new person introduced on the record in these cases, the rule laid down in *Penoyer v. Brace* (t), does not apply; and a *scire facias* is not required, to revive or continue the judgment (u).

The doctrine of survivorship does not apply to real estate. *Scire facias* therefore necessary in such cases.

But although the judgment survives, as to the personalty in these cases, yet it does not do so as to the real estate; for at common law, the plaintiff might take the goods of the survivor in execution by a *fi. fa.*; but the plaintiff, under the Statute of Westminster the Second, must sue out an *elegit* against the lands of the survivor, and also of the heir and terretenants of the deceased, and must sue out a *scire facias* against the survivor and the heir and terretenants of the deceased; for it seems that where the lands of several are charged with a debt, it shall not lie wholly upon the survivor; as if a recognizance be acknowledged by several, the lands of them all are thereby become chargeable, and execution must be equally made, and if one die, the creditor must bring a *scire facias* against the heir and terretenants, and also against the survivors, for they being all in *æquali jure*, the charge does not survive (x); but it is otherwise, where the lands are not bound by judgment; as if two entered into a bond, and one die before judgment, the survivor shall be charged alone (y). So if a plaintiff after judgment had against two, one having afterwards died, will take out execution upon the real lien, the charge must be equally against both, and the *scire facias* against both. But it is said, that if he bring *scire facias* against both, and have judgment upon it, he may have a *fi. fa.* against the survivor only, or an *elegit* against both (z).

If the plaintiff, therefore, wish to sue out an *elegit* against the

(s) *Fort v. Oliver*, 1 M. & Sel. 242.

(t) *Ante*, p. 175, n. (c).

(u) 2 Tidd's Prac. 8th ed. 1171; 2 V. Wms. Saund. 72 k, n.; Bac. Abr. tit. *Scire Facias*, C, 4; "If there be two plaintiffs in a personal action, and one of them die, that shall not put the other to a *scire facias*; so, if one of the defendants die, because the same party still remains on record;" and see *Withers v. Harris*, 7 Mod. 68.

(x) *Sir William Herbert's case*, 3 Rep. 14, and see cases cited in argu-

ment, in *Hunter v. Hunt*, 1 C. B. 301.

(y) *Lampton v. Collingwood*, 4 Mod. 315.

(z) 2 V. Wms. Saund. 50 a, n. 4, to *Trethewey v. Ackland*; *Smarte v. Edson*, 1 Lev. 30; S. C. Sir T. Raym. 26; see further for this distinction between a real and personal execution, that a personal execution survives, but a real execution does not, *Sir William Herbert's case*, 3 Rep. 14; *Panton v. Hall*, Carth. 105; *Penoyer v. Brace*, 1 Salk. 320.

lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor, and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter (a).

Scire facias against survivor and heir, and terretenants of lands to have execution.

The body of the heir is protected from execution, and execution can only issue against the lands which descend to him; for it would be most unreasonable to subject the heir to the payment of his ancestor's debts, any further than to the value of the assets descended (b).

So, at common law, in all real actions, a *scire facias* lay; and, consequently, the heir might by such a writ revive and enforce the execution of a judgment obtained by his ancestor (c).

Previous to the 1 & 2 Vict. c. 110, where a plaintiff, or executor, or administrator of a deceased plaintiff had revived a judgment by *scire facias* against the heir and terretenants, execution could have only been had of a moiety of the lands of the defendant, in the hands of the heir or terretenants by *elegit*, in the same manner as if the defendant were living (d); although the heir had pleaded a false plea (e), which in actions against an heir on the bond of his ancestor would have the effect of charging the defendant in the same manner as if the action were for his own debt. But, by the 11th section of that statute, the effect of the *elegit* (except in certain cases, as against purchasers, mortgagees, and creditors) has been extended, so as to give the plaintiff execution of all such lands, tenements, rectories, tithes, rents, and hereditaments, including such lands and hereditaments of copyhold or customary tenure, as the debtor or any person in trust for him shall have been possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person, exercise for his own benefit.

Secondly, of cases where a sole plaintiff or defendant has died: Where a sole plaintiff

(a) 2 Chit. Arch. Prac. 8th ed. p. 1019; 2 Tidd's Prac. 8th ed. 1174, *post*, p. 189, 190; *Wright v. Maddock*, 8 Q. B. 122.

(b) Bac. Abr. tit. Execution, G, 2; *Dyer*, 81, 207, 344; *Moore*, 74; *Co. Litt.* 103, 290.

(c) Bac. Abr. tit. *Scire Facias*, C, 5; 2 Inst. 469; *Sir William Herbert's*

case, 3 Co. 11; 2 Ld. Raym. 806; *Withers v. Harris*, 1 Salk. 258; *S. C.*, 7 Mod. 55; *Dighton v. Granvil*, 4 Mod. 248.

(d) See *ante*, p. 48; 2 V. Wms. Saund. 7, n.

(e) *Bowyer v. Rivett*, W. Jun. 87, 88; *Brandlin v. Millbank*, Carth. 93; *S. C.*, Com. 162.

or defendant has died pending a suit.

—which may be divided into those cases in which the plaintiff or defendant has died before final judgment; and in which the plaintiff or defendant has died after final judgment.

The cases in which a sole plaintiff or defendant has died before final judgment, may be classified into cases where the death has happened—

1. Before verdict, and after the assizes begin.
2. After verdict, and before judgment.
3. Before interlocutory judgment. And
4. After interlocutory, and before final judgment.

The death of a sole plaintiff or defendant, at any time before final judgment, was, at common law, an abatement of the suit (*f*), before the passing of the statute of the 17 Car. II. c. 8, the 1st sect. of which enacted, that “in all actions, personal, real or mixed, the death of either party, *between the verdict and the judgment*, shall not be alleged for error, so as such judgment be entered within two terms after such verdict.” This statute has been held to be confined to verdicts, and not to extend to cases where either party has died, after interlocutory judgment, and before the return of the Writ of Inquiry (*g*). The intention of the statute was, it would seem, to make a verdict obtained against a party who dies before judgment is signed, equivalent to a judgment entered up during the lifetime of such party, provided it be entered up as the statute directs (*h*). The statute extends to all personal actions, notwithstanding the cause of action could not have survived to the personal representatives of the deceased, as for a libel, &c.; therefore an executor may enter up judgment on a verdict obtained by his testator in an action for libel (*i*). It does not extend to a nonsuit. Thus where a cause was tried in December, and the plaintiff was nonsuited, and the defendant died on the 5th of January following, and afterwards judgment was signed, and a *scire facias* was issued by the administrator to revive it, the *scire facias* was set aside as irregular, on the ground that the statute does not apply to cases of nonsuit (*k*).

The statute is not confined to actions which would have survived to the personal representative.

The statute does not apply to cases of nonsuit.

(*f*) 2 Saund. 6th ed. 72, n.; Wms. 1280.
on Exec. 4th ed. 761.

(*g*) 2 Tidd's Prac. 8th ed. 1168;
Ireland v. Champneys, 4 Taunt. 884.

(*h*) *Burnett v. Holden*, 1 Lev. 277;
2 Keb. 549; *Saunders v. M'Gowan*,
12 M. & W. 221; *S. C.*, 3 D. & L.
405; *Colbeck v. Peck*, 2 Ld. Raym.

(*i*) *Palmer v. Cohen*, 2 B. & Ald.
966; 2 Chitty's Arch., 8th ed. 1016;
Griffith v. Williams, 1 Cr. & J. 47;
Wms. on Exec. 4th ed. 762.

(*k*) *Dowbiggin v. Harrison*, 10 B. &
C. 480.

It is not necessary that the judgment should be actually entered upon the roll within two terms after the verdict; if it be signed within that time, it will suffice (*l*).

1. *Where the death of the plaintiff or defendant happens before verdict, and after the assizes begin.*—It has been held, that the death of either party before the assizes is not remedied by the statute (*m*). But if the party die *after the assizes begin*, though the trial be after his death, that is within the remedy of the statute; for the assizes are but one day in law, and this is a remedial law, and shall be construed favourably (*n*).

Where the death of the plaintiff or defendant happens before verdict and after the assizes begin.

Besides, it is to be remembered, that the cause might have been tried at any period after it had once been entered in the judge's cause paper. Nothing but the multiplicity of business prevented it from being tried on the first day of the sittings (*o*).

All the verdicts, therefore, given in the course of an assizes have reference to the first day—or commission day; and this construction of the statute has always prevailed (*p*). And, even if a plaintiff or defendant died upon the commission day, though at one o'clock in the morning, it would be helped by the statute, which provides, that the death of either party after verdict shall not be a cause to reverse the judgment; for there can be no fraction of a day (*q*).

If the lessor of the plaintiff in ejectment die after issue joined and before trial, or even after trial and before payment of costs, the defendant cannot recover his costs against the lessor's executor or administrator; for the consent rule was merely personal, to make the party liable to an attachment if he refused to pay the costs (*r*). For the same reason, if the lessor of the plaintiff die

(*l*) *Holbe v. Baker*, 1 Sid. 385; *Webb v. Spurrell*, Barnes, 261; 2 Saund. 72 m; *Duke of Norfolk's case*, 1 Salk. 401.

(*m*) *Taylor v. Harris*, 3 B. & P. 549.

(*n*) *Anon.* 1 Salk. 8; Ejectment tried at Exeter; the defendant died the day before the assizes began, and upon trial on full evidence verdict was found for the plaintiff, and it was afterwards held as above on motion in arrest of judgment, 2 V. Wms. Saund. 72, n.; Wms. on Exec. 4th ed. 761; *Flower v. Webb*, 2 Ld. Raym. 1415, n.

(*o*) *Per Lord Alvanley in Taylor v. Harris*, 3 B. & P. 549.

(*p*) *Jacobs v. Miniconi*, 7 T. R. 32.

(*q*) See note to *Jacobs v. Miniconi*, *ubi supra*. "So a verdict at any time of the assizes is before the death of a party who dies upon the commission day, within the notion and equity of a remedial statute intended for the settlement of right." Where, however, it is necessary to show which was the first of two acts, the Court is at liberty to consider even the fraction of a day, *Chick v. Smith*, 8 Dowl. 337.

(*r*) *Doe v. Grundy*, 1 B. & C. 284; *Thrustout v. Bedwell*, 2 Wils. 7; *Doe v. Ford*, 2 Smith, 407; Adams on Eject. 335, 3rd ed.

before the commission day of the assizes, and the plaintiff is nonsuited on account of the defendant's not confessing, &c., the executor or administrator of the lessor cannot recover any costs (*t*).

But where a defendant died the night before the trial of a cause, at the sittings in Term, and the cause came on for trial, the verdict and the judgment entered up thereon were set aside, upon application to the Court (*u*). The sittings in Term are not regarded as one sitting in law, so that a trial at any sitting day would have relation to the first day of the sittings (*x*). It has, however, been held in a later case, in which *Taylor v. Harris* was referred to, that all the causes that are tried by adjournment from the first day of a sittings in Term, are to be considered as tried on that day (*y*). Hence it follows, that if a plaintiff or defendant die after a sittings begin, and the cause be tried during those sittings, though after his death, the case is within the remedy of the statute (*z*). The judgment upon this statute is entered for or against the party, as if he were alive (*a*); and it should be entered, or at least, signed (*b*), within two terms after the verdict (*c*); for signing the judgment is an entering of it within the statute (*d*). The *scire facias* must pursue the judgment, and must recite it, as if it had been entered in the deceased party's lifetime (*e*), and must be in the same form as if he had died after the judgment.

From these decisions, it follows, of course, if a plaintiff or defendant should die before the first day of the assizes or sittings, and before the cause has been entered for trial, that the old com-

(*t*) 2 Wils. 7; but where the husband and wife were lessors, and the husband died after entering into the rule, the wife was held liable for costs; *Harrison, L. and T.* 835, 3rd ed.; and costs taxed upon the common rule by consent have been ordered to be paid by the defendant to the representative of the lessor of the plaintiff, who died after trial, *Barnes*, 119.

(*u*) *Taylor v. Harris*, 3 Bos. & Pul. 549. "The sittings in term neither commence with the term, nor are any part of the term, they are appointed at the discretion of the chief justice."

(*x*) *Johnson v. Budge*, 3 Dowl. P. C. 207; *Johnson v. Hamilton*, 4 Dowl. 762.

(*y*) *Cheetham v. Shovenant*, 12 M.

& W. 515; and see *Moon v. Robinson*, 14 M. & W. 427.

(*z*) 1 Wms. on Exec. 761, 4th ed. n.

(*a*) *Weston v. James*, 1 Salk. 42; *Colebeck v. Peck*, 2 Ld. Raym. 1280; 2 V. Wms. Saund, 72, n.; *Burnett v. Holden, executor*, 1 Mod. 6; 2 Tidd's Prac. 8th ed. 1168.

(*b*) *Holte v. Baker*, 1 Sid. 385; *Webb v. Spurrell*, *Barnes*, 261; *Duke of Norfolk's case*, 1 Salk. 401.

(*c*) But see *Chancel v. Chimelli*, 4 B. & Ad. 590; *S. C.*, 1 Nev. & M. 731.

(*d*) See note (*t*), *ante*, page 181.

(*e*) *Colebeck v. Peck*, 2 Ld. Raym. 1280; *Burnett v. Holden*, 1 Lev. 277; 1 Mod. 6; *Saunders v. M^r Gowran*, 12 M. & W. 224, *ante*, note (*a*).

mon-law rule prevails, and the suit would be thereby abated (e). Otherwise, not; and a *scire facias* would then be required by or against the personal representatives of the deceased plaintiff or defendant, to have execution of the judgment.

2. *Of cases where the death of the plaintiff, or defendant, has occurred after verdict, and before judgment.*—The intention of the statute (f), it would appear from the cases which have been decided upon it was, to make a verdict obtained against a party who dies before judgment is signed, (provided it be entered up within two terms after the verdict, as directed by the Statute,) of the same effect in binding the goods and chattels of such defendant in the hands of his executor or administrator, and his lands in the hands of his heir, as if the judgment had been entered up in his lifetime.

Thus, in *Colebeck v. Peck* (g), in which the plaintiff sued a *scire facias* against the defendant, as executor to T. S., on a judgment obtained by him against the testator, who died after the verdict, and before the judgment; the writ of *scire facias* being general, and supposing a judgment signed against the testator in his lifetime, was held on demurrer to be good. Parke, B., in speaking of this case, when cited in *Saunders v. M'Gowran* (h), says, it "seems to show, that a judgment against a party who has died after verdict, but before judgment, is to have the same effect as if the party had been alive. The rule there laid down is, that the plaintiff may enter up judgment in the cause, as if the party were alive."

And in *Saunders v. M'Gowran and another* (h), where the plaintiff obtained a verdict, and M'Gowran having died before the judgment was entered, the judgment was entered up under the stat. 17 Car. II. c. 8, s. 1, and a *scire facias* was issued against the heir and terretenants of M'Gowran, that they might show cause why the damages, &c., should not be levied on their lands and tenements; it was contended, that the lands having descended to the heir before the judgment was signed, they were not bound by the judgment against the ancestor; but the Court held that, according to the case of *Burnet v. Holden* (i), goods and chattels were clearly bound by the judgment, and that by analogy it would bind in the case of land also (k).

(e) And see *ante*, p. 182, n. (a);
Taylor v. Harris, 3 B. & P. 549.

(f) See the stat. cited *ante*, p. 180.

(g) 2 Ld. Raym. 1280; *Burnett v. Holden*, 1 Lev. 227.

(h) 12 M. & W. 224.

(i) 1 Lev. 227; S. C. 1 Mod. 6.

(k) In the course of the argument, in *Saunders v. M'Gowran*, Mr. Baron Parke is reported to have said, "The

Where the death of the plaintiff or defendant happens after verdict and before judgment.

Where a plaintiff obtained a verdict at the Spring Assizes, and the defendant died afterwards on the 18th of April; the costs were taxed on the 21st, final judgment was signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the term, without a previous *scire facias* having been issued; the Court refused to set aside the *fi. fa.* for the irregularity, the writ of *fi. fa.* being on the face of it regular. The objection should have been to the judgment (*l*).

It has been already seen that the judgment must be entered, or at least signed within two terms after the verdict (*m*).

Entering
judgment
nunc pro
tunc.

Where there has been any delay in signing the judgment by an executor or administrator, not imputable to the laches of the party, but to the act of the Court, the Court will usually permit the judgment to be entered *nunc pro tunc* (*n*). The power of the Court to enter judgment *nunc pro tunc* does not, however, in any respect depend upon the statute 17 Car. II. c. 8. It is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of the Court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. The effect of the judgment, when entered, may depend on the statute 17 Car. II. c. 8; but the power to enter it does not (*o*). If, therefore, either party die after a special verdict, or a special case, and pending the decision thereon, or after a motion in arrest of judgment, or for a new trial, or pending the time that a demurrer is waiting for argument, or for the judgment of the Court, judgment may be entered at common law, after the death of such party, *nunc pro tunc*, as of the term in which the postea was returnable, or judgment would otherwise have been given; in order that the delay arising from the act of the Court may not turn to the prejudice of the party (*p*). So a judgment may be entered *nunc pro tunc* without reference to the statute of Chas. II., where a verdict has been taken, subject to an award,

lands are bound by the judgment in the same manner as if the ancestor had been living, and had sold them under the like circumstances."

(*l*) *Watson v. Maskell*, 2 Dowl. 810.

(*m*) See *ante*, p. 182, n. (*b*), (*c*).

(*n*) Chit. Arch. Prac. 8th ed. 1016; *Harrison and others v. Heathorn and others*, 1 D & L. 529.

(*o*) *Evans v. Rees*, 12 Ad. & El. 175.

(*p*) Wms. on Exec. 4th ed. 762;

Chit. Arch. Prac. 8th ed. 1016; Tidd's Prac. 9th ed. 932; *Carlisle v. Garland*, 9 Bing. 85; *Key v. Goodwin*, 1 M. & S. 620; *Brydges v. Smyth*, *ib.* 93; *Griffith v. Williams*, 1 Cr. & J. 47; *Lawrence v. Hodson*, 1 Y. & J. 363; *Gilbert v. Dyneley*, 3 Scott, N. R. 385; *Lauman v. Lord Audley*, 2 Scott, 83; 8 Bing. 22; *Brydges v. Smith*, 4 Bing. N. S. 116; *Mara v. Quin*, 6 T. R. 7.

and the award is made in the lifetime of the parties, but pending a rule to set aside the award, one of the parties dies (q). But at common law, a judgment cannot in any case be entered *nunc pro tunc*, unless the delay be attributable to the act of the Court (r); nor will the Court grant leave so to enter the judgment, except on that ground (s).

By the rule of Hilary Term (Pleading Rules), 4 Will. IV. r. 3 (t), "All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day. Provided, that it shall be competent for the Court or a judge to order a judgment to be entered *nunc pro tunc*. But this rule only applies, as formerly, to the cases where the delay is occasioned by the act of the Court (u). The general rule is that judgment cannot be entered up against a party after his death; but where the parties have been delayed by the act of the Court, protection may be extended to them in consequence (x). Thus in *Blewett v. Tregoning* (y), where, after the plaintiff had obtained a verdict, the defendant obtained a rule *nisi* for a new trial, which, after the lapse of a year, was discharged, the defendant having died in the mean time, the Court ordered judgment to be entered *nunc pro tunc*, though more than two terms had elapsed since the discharge of the rule, it appearing that the delay was occasioned by the taxation of the costs, without any fault being imputable to the plaintiff (z). Where by the terms of a judge's order, made by consent, a plaintiff was to be at liberty to sign judgment for debt and costs on a particular day, but before that day the defendant died, the Court would not permit the plaintiff to enter judgment *nunc pro tunc* as of the day when the consent was given, as it would be in effect introducing a new term into the order, without the consent of one of the parties (a).

The Court has no power to order rules made under the Interpleader Act (1 & 2 Will. IV. c. 58), to be entered up other than

(q) *Brydges v. Smith*, 8 Bing. 29.

(r) *Lawrence v. Hodgson*, 1 Y. & J. 368; *Lauman v. Lord Audley*, 2 M. & W. 535.

(s) *Doe d. Taylor v. Crisp*, 7 Dowl. 584; *Blackburn v. Godrich*, 9 Dowl. 337; 2 Chit. Arch. Prac. 8th ed. 1017.

(t) *Jervis's New Rules*, p. 116.

(u) *Lauman v. Lord Audley*, 2 M. & W. 535; *Lambirth v. Barrington*, 2

Bing. N. C. 149.

(x) *Vaughan v. Wilson*, 6 Dowl. P. C. 210; *Doe d. Taylor v. Crisp*, 7 Dowl. 584.

(y) 4 Ad. & E. 1002.

(z) And see *Evans v. Rees*, 12 Ad. & E. 167, where all the cases are referred to.

(a) *Wilkins v. Cauty*, 1 D. N. S. 855.

as pointed out in the 7th sect., namely, according to their true date (*b*).

There must be a *scire facias* to revive the judgment in all cases, before execution can be issued by the personal representatives of the deceased (*c*). In one case, however, where the plaintiffs' attorney gave the defendants' attorney their own undertaking, as security for costs, and the defendant obtained a verdict, and died, and judgment was entered up in his name in two terms, it was held, that the attorney for such deceased defendant, having a claim against his estate in respect of the costs, might enforce the security, to satisfy such claims, without any *scire facias* having been sued out by the personal representatives (*d*). As the judgment is general against the party, as if he were living at the time it was entered, so the *scire facias* must follow the judgment, and recite it as if it had been entered in his lifetime; or, in other words, the *scire facias* must be in the usual form the writ is conceived in, when brought by or against the personal representatives of a party, by or against whom a judgment has been obtained (*e*).

When the death of the plaintiff or defendant happens before interlocutory judgment.

3. *Of cases where the death of the plaintiff or defendant has occurred before interlocutory judgment.*—If a plaintiff or defendant should die before interlocutory judgment, the common-law rule applies, and the suit abates, as the case is not within the statute of 17 Car. II. c. 8, s. 1 (*f*); and it has been held not to be within the statute 8 & 9 Will. III. c. 11, s. 6, which provides, that if a plaintiff or defendant should die *after* interlocutory and *before* final judgment, the action shall not abate (*g*). In *Wallop v. Irvin* (*h*), where a defendant died before interlocutory judgment, it was held to be irregular to sign interlocutory judgment afterwards, and proceed upon the statute of 8 & 9 Will. III.

Where the death of the plaintiff or defendant happens after interlocutory and before final judgment.

4. *Of cases where the death of the plaintiff or the defendant has occurred after interlocutory and before final judgment.*—By the statute 8 & 9 Will. III. c. 11, s. 6, it was enacted, "that in all actions to be commenced in any Court of Record, if the plaintiff or defendant should happen to die, *after* interlocutory and *before*

(*b*) *Lambirth v. Barrington*, 4 Dowl. 126.

(*c*) *Earl v. Brown*, 1 Wils. 302; Bac. Abr. tit. *Scire Facias*, C, 4; 2 Inst. 471; Godb. 83; Cart. 112, 113.

(*d*) *Chawel v. Chimelli*, 4 B. & Ad. 590.

(*e*) 2 Tidd's Prac. 8th ed. 1168; 2 V. Wms. Saund. 72 o; 1 Wms. on

Exec. 4th ed. 762; *Colebeck v. Peck*, 2 Ld. Raym. 1280; *Burnett v. Holden*, 1 Lev. 277; S. C. 1 Mod. 6; see references to forms, *post*, Append. in these cases.

(*f*) *Ante*, p. 180.

(*g*) See *post*.

(*h*) 1 Wils. 315; 2 V. Wms. Saund. 72 q.

final judgment, the action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying; but the plaintiff, or, if he be dead, after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or being returned warned, (or upon two writs of *scire facias*, it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county,) shall make default, that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias* against such defendant, his executors or administrators respectively." It will be seen that the provisions of this enactment are expressly confined to those cases in which the action might "originally have been prosecuted or maintained by or against the executors or administrators of the party dying;" an action for libel, therefore, where the damages are personal, has been held by the Court of Common Pleas to abate by the death of the plaintiff after interlocutory judgment, and writ of inquiry executed, but before the day in banc, and that final judgment could not be entered for the plaintiff for the damages assessed (i).

Should either party die after interlocutory judgment, and before the execution of the writ of inquiry, the form of the *scire facias* should be for the defendant, or his executors or administrators, to show cause why the damages should not be *assessed and recovered* against them (k), and to hear the judgment of the Court thereupon (l). When, however, the death happens after the writ of inquiry is executed, and before final judgment, the *scire facias* must be

Form of the writ.

(i) *Ireland v. Champneys*, 4 Taunt. 864.

(k) See Lil. Entries, 647; *Smith v. Harmon*, 1 Salk. 315; "He is by the words of the statute to show cause why damages in such case shall not be assessed and recovered; and if he shall appear at the return, and not show any

matter sufficient to arrest the final judgment, then a writ of inquiry shall be awarded." 2 V. Wms. Saund. 72 g; 1 Wms. on Exec. 4th ed. 763; 2 *ib.* 1707.

(l) See *Smith v. Harmon*, 6 Mod. 145, *per* Holt, C. J.; 2 Tidd's Prac. 8th ed. 1170.

to show cause why the damages assessed by the jury should not be adjudged to the plaintiff or his executors or administrators (*m*), "the *scire facias* being a *quasi* continuation of a matter of record, in order to have execution thereon" (*n*).

Final judgment under this statute must be signed against the executors and administrators of the party, for they are expressly taken notice of for that end, and the *scire facias* is to be against them, and not against the testator or intestate himself, as under the former statute of 17 Car. II. c. 8, which (where the defendant dies after verdict) makes the judgment good against the defendant only (*o*).

When two writs of *scire facias* necessary.

Where the defendant dies after interlocutory, and before final judgment, the plaintiff must sue out two writs of *scire facias*, to enable him to obtain execution; one before final judgment is signed, in order to make the executors or administrators, who are strangers to the record, parties to it (*p*); the other after final judgment is signed, in order that they may have an opportunity of pleading no assets, or any other matter of defence which an executor or administrator may plead. For it would be unreasonable that the executors or administrators should be in a worse situation where their testator or intestate died before final judgment, than they would have been in if he had died after (*q*). As in the case of *Poulett v. Wightman* (*r*), before the House of Lords, where the defendant died intestate after interlocutory judgment signed, and a writ of inquiry of damages executed; but before it was returned, the plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment, "to have execution against the defendant as administrator according to the force, form, and effect of the said recovery;" no

(*m*) *Goldworthy v. Southcott*, 1 Wils. 243; *Wright v. Nutt*, 1 T. R. 388; 2 V. Wms. Saund. 72 *q*; 2 Tidd's Prac. 8th ed. 1170.

(*n*) *Cocks v. Brewer*, 11 M. & W. 56; *Wright v. Nutt*, 1 T. R. 388.

(*o*) *Weston v. James*, 1 Salk. 42; 1 Wms. on Exec. 4th ed. 766; 2 *ib.* 1707.

(*p*) See *ante*, book ii. ch. i.; and

see *post*, p. 193.

(*q*) *Tomkins v. Gratton*, Say. Rep. 266; 2 V. Wms. Saund. 72, n.; 2 Tidd's Prac. 8th ed. 1170; 2 Wms. on Exec. 4th ed. 1707. As to whether the rule for a *scire facias* should be a rule *nisi* or absolute, in the first instance, see *Brown v. Evans*, 2 Tyrw. 389.

(*r*) 1 Blj., N. S., 138.

recovery having been before stated in any part of the proceedings on the record, no final judgment having been given in the original action, and no provision being made by the judgment for the specialty debts, it was held that the judgment was erroneous, and it was reversed with costs (s).

To the *scire facias* upon the interlocutory judgment, the defendant's executor cannot plead a judgment obtained against him on a bond due to the testator, and no assets ultra, nor any plea of a similar nature; for the statute did not intend that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar arising *puis darrein* (t). What the executor may plead.

Secondly, of those cases in which a sole plaintiff or defendant has died after final judgment, and before execution.—Where a sole plaintiff or defendant dies after final judgment and before execution, a *scire facias* must be sued out by or against his personal representatives, in order that execution may be had of the goods and chattels of the party against whom the judgment is given, the rule laid down in *Penoyer v. Brace* (u) applying. Where a sole plaintiff or defendant has died after final judgment and before execution.

The *scire facias* must be brought by or against the persons who represent the deceased. If the plaintiff in a personal action die, the *scire facias* must be brought by his executor or administrator; in a real action by his heir (x). In a mixed action it is said, if the lands to be recovered be fee simple, the heir and executor shall join in the *scire facias*, and the heir have execution as to the lands, and the executor execution as to the damages (y). On the death of a plaintiff, the *scire facias* may be in the names of all the executors, although one only has proved the will (z).

Thus, upon the death of the party against whom the judgment is given, in order to have execution of his lands, the other party (whether plaintiff or defendant) must proceed by *scire facias*

(s) 2 V. Wms. Saund. 72 r, n.; 2 Wms. on Exec. 1708, 4th ed.

(t) *Smith v. Harmon*, 1 Salk. 315; S. C., 6 Mod. 142; 2 Wms. on Exec. 4th ed. 1708; and see *Berger v. Green*, 1 M. & S. 229.

(u) *Ante*, p. 175; 1 Ld. Raym. 245; S. C., 1 Salk. 319; 2 V. Wms. Saund. 6th ed. 6, n. 1; *ante*, book ii. ch. i; 1 Wms. on Exec. 4th ed. 761; *Earl*

v. Brown, 1 Wils. 302; *Chauwell v. Chimelli*, 4 B & Ad. 590; Bac. Abr. tit. Execution, G, 2; Com. Dig. Exec. F, Pleader, 3 L 7.

(x) Bac. Abr. tit. Scire Facias, C, 5.

(y) 19 E. 45 b; 43 E. 3, 2; Rol. Abr. 889; 2 Chit. Arch. 8th ed. 1014.

(z) *Scott v. Briant*, 6 N. & M. 381.

against the heir and terretenants, in order to have execution by *elegit* against the lands of the judgment debtor (a).

But when judgment is had against one who dies before execution, a *scire facias* will not lie against his heir and terretenants until *nilil* be returned to a *scire facias* against his executors or administrators (b).

And where a *scire facias* has properly issued against the executor or administrator, and revived the judgment, even though it be more than fifteen years old, and under the Reg. Gen. of Hil. Term, 2 Will. IV. i. 79 (c), requiring a rule to show cause before it could issue, the judgment being revived against the executor or administrator, the *scire facias* may issue at once against the heir and terretenants, calling upon them to show why the lands should not be delivered in pursuance of such judgment without any previous rule to show cause as against them, and they can plead any defence they may have in answer to the second *scire facias* (d).

When *nilil* is returned, the plaintiff may have a *scire facias* against the heir of the defendant, either alone or jointly with the tenants of the lands whereof the defendant was seised at the time of the judgment, or at any time after (e). It is the usual way to join the heir and terretenants in the writ of *scire facias* (f); but it is said that, if it be returned that the heir has no lands, the writ may proceed against the tenants of the lands without him (g), and it may be either against the tenants of the lands generally without naming them, or against them by name (h); but the former is the usual form; for if the plaintiff undertake to name them, he must name them all, and if he do not, those who are named may plead in abatement (i). It seems, however, to be the better opinion, that the terretenants alone are not to be charged until the heir be summoned, or it be returned that there is no

(a) 2 Tidd. Prac. 8th ed. 1171; 2 Inst. 395; 1 Wms. on Exec. 4th ed. 766; 2 Chit. Arch. 8th ed. 1013.

(b) Carth. 107; 2 Tidd's Prac. 8th ed. 1173; 2 Saund. 6th ed. 72 s; Bac. Abr. tit. Scire Facias, C, 5.

(c) 3 B. & Ad. 385.

(d) *Wright v. Madocks and others*, 8 Q. B. 119.

(e) 2 Saund. 6th ed. 72 s; *Wright v. Madocks*, 8 Q. B. 122.

(f) F. N. B. 597; *Heydon's case*, Cro. Eliz. 896; *Eyres v. Taunton*, Cro. Car. 295.

(g) F. N. B. 597; but see 2 Saund. 6th ed. 72 s; 2 Tidd's Prac. 8th ed. 1173.

(h) *Proctor v. Johnson*, 2 Salk. 600; Bac. Abr. tit. Scire Facias, C, 5.

(i) *Beresford v. Cole*, Comb. 282; 2 Saund. 6th ed. 7, n. 4; Bac. Abr. tit. Scire Facias, C, 5.

heir, or that the heir hath not any lands to be charged; for the heir may have a release to plead, or other matter, in bar of execution; and his land is rather to be charged than the land of the terretenants; for the heir shall not have contribution against the terretenants as they shall against him; also, if the heir be within age, the *parol* shall demur, and the terretenants shall have the advantage of it (*k*).

So the executors or administrators of the plaintiff (or party recovering the judgment) may have execution by *elegit*, as well as the plaintiff himself; but under the rule in *Penoyer v. Brace* (*l*) they cannot sue it out without a *scire facias*, even within a year. So they may have a *scire facias* by a favourable construction of the statute 32 Hen. VIII. c. 5 (*m*), in order to obtain a new writ of *elegit*, if lands have been delivered to their testator in execution on a judgment, and he have been evicted before the judgment debt has been wholly levied (*n*). If any of the executors or administrators are *feme covert*, their husbands must be made parties to the *scire facias* (*o*); and although an executor or administrator become bankrupt, he may still proceed by *scire facias*, as the bankruptcy does not affect his representative character (*o*).

It seems to be clearly settled, says Chief Baron Gilbert, that if an administrator *durante minore etate* of an executor brings an action and recovers, and then his time determines, the executor may have a *scire facias* upon that judgment (*p*). If a judgment be obtained by an executor or an administrator *durante minore etate*, the executor at his full age may have a *scire facias*, for he is privy to the judgment (*q*).

Scire facias by administrator *durante minore etate* of an executor.

The *scire facias* on a judgment by the personal representatives states, in addition to the judgment, the death of the testator or intestate, as the Court has been informed by the person suing it out, who is described as his executor or administrator. If the writ be brought against personal representatives, it states that the testator died having made the defendant his executor, or

(*k*) Viner's Abr. tit. Exec. (R. a); Bac. Abr. tit. Scire Facias, C. 5; 2 Tidd's Prac. 8th ed. 1174; 2 Saund. 6th ed. 72 s.

(*l*) *Ubi supra*, 2 Inst. 395; 2 Saund. 6th ed. 68 e.

(*m*) See *ante*, book 1. ch. 4.

(*n*) Co. Litt. 290; 2 Saund. 6th ed. 68 e.

(*o*) 2 Saund. 6th ed. 72 r.

(*p*) Bac. Abr. tit. Executors, B. 1; *Beaumont v. Long*, Cro. Car. 227; *Barb-lock v. Read*, Anon. Godb. 104; *Hallton v. Masene*, 1 Keb. 750; 1 Lev. 181; *Coke v. Hodges*, 1 Vern. 25; *Major v. Peck*, 1 Lutw. 342; *per Cur. Anon.* 3 Leon. 278; *Kemp v. Lawrence*, Owen, 134; *King v. Death*, Brownl. 57, *contra*.

(*q*) Com. Dig. tit. Pleader, 3 L. 5.

in the case of an administrator, the death of the intestate and the grant of administration; and it is for the defendant to show why the plaintiff should not have execution of the debt or damages to be levied of the goods and chattels which were of the testator or intestate at the time of his death, in the defendant's hands to be administered (s).

An affidavit in support of a rule absolute for a judgment on a *scire facias* at the suit of executors on default of appearance by the defendant, after notice that in default of appearance judgment would be obtained thereon, must show that the probate has been granted to them; as the Court before it can grant judgment ought to be fully satisfied that probate has been taken out (t).

But although when the judgment creditor dies before execution, his executor or administrator cannot proceed without a *scire facias*; yet if the testator or intestate should die *after* the defendant is charged in execution, the executor or administrator is not in such a case bound to revive the judgment by *scire facias*, or to charge the defendant in execution *de novo* (u); or if the plaintiff appointed no executor, or administration be not granted, the money must be brought into court, and there be deposited until, &c. (x).

No *scire facias* necessary where the death of the judgment creditor happens after the debtor is charged in execution.

And if the defendant die after execution is sued out, the writ may, it seems, notwithstanding be executed on his goods in the hands of the executor, &c. (y)

But where the plaintiff having charged the defendant in execution died, and the defendant's wife took out administration to the plaintiff, the Court ordered the defendant to be discharged out of custody, as there was an end of the action, the defendant's wife being the legal representative of the plaintiff; and it was held that the plaintiff's attorney had no lien on the judgment for his

(s) Tidd's Prac. 8th ed. 1173; 2 Wms. on Exec. 4th ed. 1702; and see References to Forms, Append. *post*.

(t) *Vogel and another, Executors, v. Thompson*, 1 Exch. 60; S. C., 5 D. & L. 114.

(u) 1 Tidd's Prac. 8th ed. 370; 1 B. & P. 176; 2 Tidd's Prac. 8th ed. 1171; 1 Wms. on Exec. 768; 2 Chit. Arch. 8th ed. 1013; *Coleve v. Veer*, Cro. Car. 459. "There is a difference betwixt a judicial writ after judgment to do execution and a

writ original; for the writ judicial to make execution shall not abate, nor is it abateable by the death of him who sues it;" and see *Harrison v. Bowden*, 1 Sid. 29; *Clerk v. Withers*, 2 Ld. Raym. 1073; S. C., 1 Salk. 322; Tidd, 9th ed. p. 1000.

(x) *Thoroughgood's case*, Noy, 73; *Clerk v. Withers*, 2 Ld. Raym. 1073.

(y) 3 Wils. 399; Comb. 33; 1 Chit. Arch. 548, 8th ed.; 2 Chitty's Arch. 8th ed. 1013; 6 Bac. Abr. tit. *Scire Facias*, C, 1.

costs (z). The Court of Common Pleas have also discharged a defendant out of custody, in execution after the plaintiff's death, it appearing that the next of kin on service of the rule *nisi* did not intend to take out administration (a). But they would not discharge a defendant out of custody in execution at the suit of a plaintiff, although the application was not made till eighteen months after the death of the latter, it appearing that he had appointed executors, who were still alive, and who had not assented to the discharge (b).

Where a judgment was signed against a defendant, which was afterwards set aside on the terms of payment of costs, but the defendant having died before the rule was made absolute, the plaintiff got that rule set aside, and commenced an action of *scire facias* on the judgment; the Court allowed the administrator to come in and defend in the name of the original defendant, and set aside all proceedings subsequent to the declaration, on payment of costs, except those of the rule to rescind (c).

Where a defendant seeks to obtain his discharge as an insolvent, the plaintiff having died, he must serve the notice on the personal representative, or show that there is no personal representative, before a notice to the attorney of the plaintiff will be deemed sufficient (d).

The efficacy of a writ in execution of a judgment does not cease with the death of the judgment creditor; and, therefore, a writ of *capias ad satisfaciendum*, issued in the lifetime of the judgment creditor, may be executed after his death; and that is no ground for the discharge of the defendant out of custody (e). So, if the plaintiff die after a *fiery facias* sued out, the writ may, notwithstanding, be executed, and his executor or administrator shall have the money; or if there be no executor, and administration be not as yet granted, the money shall be brought into Court, and there deposited until some person appear to claim it as representative of the deceased (f).

No action of debt suggesting a *devastavit* by the executor will lie against him upon a judgment obtained against his testator;

Where the defendant seeks to obtain his discharge as an insolvent, the plaintiff having died.

Writ of execution issued in the lifetime of the judgment creditor valid after his death.

Of *scire facias* against an executor.

(z) *Payne v. Erle*, 8 T. R. 407.

& P. 743.

(a) *Parkinson v. Horlock*, 2 N. R. 240; *Broughton v. Martin*, 1 B. & P. 176.

(c) *Cash v. Cock*, 2 Dowl. P. C. 3.

(d) *Ex parte Richer*, 4 Dowl. P. C. 275.

(b) *Dunford v. Gouldsmith*, 8 Moore, 145; *Holmes v. Murcott*, 3 Moore, 529; *S. C.*, 1 Bingh. 431; *Fothergill v. Walton*, 4 Bingh. 711; *S. C.*, 1 M.

(e) *Ellis v. Griffith*, 16 M. & W. 106.

(f) *Clerk v. Withers*, 2 Ld. Raym. 1072; 1 Chitty's Arch. 8th ed. 548.

because that is no admission of assets by the executor: and, therefore, in such cases, it is necessary to sue out a writ of *scire facias* against the executor, to make him a party to the judgment (*g*).

A creditor may, in some cases, take the testator's goods in execution in the hands of the executor; as, where judgment has been recovered within a year before the testator's death (*h*): in which case the judgment and execution will bind the goods from the day of the signing of the judgment and the teste of the writ of execution against all but purchasers (*i*). And, provided the writ of *fi. fa.* be tested in the lifetime of the defendant, the execution creditor may issue it after the defendant's death; the 3 & 4 Will. IV. c. 67, s. 2, providing that "all writs of execution *may* be tested on the day on which the same are issued," not being obligatory (*k*). Care however must be taken, in such cases, to test the writ of execution on a day previous to the testator's death; for, if tested on a subsequent day, it would be an irregularity (*l*); and also that it is not taken out tested before the judgment is actually signed (*m*).

Declaration
by execu-
tors and
administra-
tors.

In a declaration by executors or administrators it is usual to make a profert of the letters testamentary, or of administration (*n*).

It is not necessary to state the death of the testator in a *scire facias* on a judgment recovered by an executor (*o*).

What may
be pleaded
by them.

With respect to the pleas which an executor or administrator may plead in defence to a *scire facias*, upon a final judgment obtained against his testator or intestate, it is said that if

(*g*) *Crosby v. Geering*, cited in *Berwick v. Andrews*, 2 Ld. Raym. 972; 2 Wms. on Exec. 4th ed. 1700; see references to forms, post, Append.

(*h*) *Odes v. Woodward*, 2 Ld. Raym. 850; 1 Saund. 219 *f*, n.; *Breyner v. Langmead*, 7 T. R. 20; *Waghorne v. Langmead*, 1 Bos. & Pull. 571; *Calvert v. Tomlin*, 5 Bing. 1; *S. C.*, 1 M. & P. 1; *Fann v. Atkinson*, Willes, 427; 2 Ld. Raym. 766; 7 Mod. 2, 93; 1 Salk. 87; *Robinson v. Tonge*, 3 P. Wms. 398; *Finch v. Winchelsea*, *ibid.* note (*e*); *Heapy v. Parris*, 6 T. R. 368; 2 Wms. on Exec. 4th ed. 1701.

(*i*) 1 Saund. 219 *f*, *g*.

(*k*) *Brocher v. Pond*, 2 Dowl. P. C. 472; the words of the stat. are "may

be tested," not "must be tested;" and see *Harmer v. Johnson*, 14 M. & W. 336; *S. C.*, 3 D. & L. 38; *Peacock v. Day*, 3 Dowl. P. C. 291.

(*l*) *Heapy v. Parris*, 6 T. R. 369; and see note to *Peacock v. Day*, 3 Dowl. P. C. 294; *Chick v. Smith*, 8 Dowl. 337; 2 Saund. 6th ed. 219, *g*.

(*m*) *Parsons v. Gell*, 7 T. R. 21, note (*c*); 2 Wms. on Exec. 4th ed. 1701.

(*n*) 2 Saund. 6th ed. 72 *bb*; 2 Saund. 9*f*, 6th ed. note (12); *Bosworth v. Ridgeley*, Carth. 69; Com. Dig. tit. Pleader, 3 L, 3.

(*o*) Bac. Abr. tit. Scire Facias, D; *Morfoot v. Chivers et Uxor*, 1 Stra. 631.

an executor or administrator plead *plene administravit*, it is bad on special demurrer; and that he ought to plead that he had nothing in his hands at the time of the death of his testator or intestate, or that no goods came to his hands except so much (if any did), and show how he administered them (*p*). But this seems questionable; and indeed Lord Holt said, in the case of *Newton v. Richards* (*q*), that precedents prevailed with him more than the reason of the thing. The plea was pleaded in *Heckey v. Hayter* (*r*) without any objection, it being agreed on all hands that such a plea was good.

The practice of the Court cannot be pleaded as an answer to an existing judgment; thus, where, to a declaration in *scire facias* by an executrix upon a judgment recovered by her testator, the defendant pleaded that before the giving of the judgment in the declaration mentioned, a rule of Court was drawn up by consent that the verdict should be reduced to 1*s.*, and that the defendant should pay the costs of the action, which rule was still in force; and that the *scire facias* was sued out after the making of the said rule fraudulently and in breach of good faith, the plea upon demurrer was held bad on the above ground (*s*).

If the judgment on which the *scire facias* has been brought has not been docketed, pursuant to the statute 4 & 5 Will. & M. c. 20 (*t*), the executor or administrator may give in evidence, under a plea of *plene administravit*, the payment of other simple-contract debts before action brought, which exhausted all the

Evidence
under plea
of *plene ad-
ministravit*.

(*p*) *Harecourt v. Wrenham*, Moore, 858; *Ordway v. Godfrey*, Cro. Eliz. 575; *Petchett v. Woolston*, Aleyn, 47, 48; *Newton v. Richards*, 1 Salk. 296; *S. C.*, Comb. 298; *Skin*. 565; 4 Mod. 296; 1 Ld. Raym. 3, 4; 2 Saund. 6th ed. 72 *dd*, n.; 2 Wms. on Exec. 4th ed. 1703; Com. Dig. tit. Pleader, 3, L, 12.

(*q*) 1 Salk. 296, *ut supra*.

(*r*) 6 T. R. 384; 2 Saund. 6th ed. 72 *dd*, n. (*m*); and see *Hall v. Tupper*, 3 B. & Ad. 655.

(*s*) *Farmer (Executrix) v. Mottram*, 1 D. & L. 781.

(*t*) The statute provides, that no judgment, not docketed and entered in the books kept for that purpose according to this Act, shall affect any lands or tenements as to purchasers or

mortgagees, or have any preference against heirs, executors, or administrators, in the administration of their ancestors', testators', or intestates' effects. And it has been held, both in law and in equity, that, in the administration of ancestors' or testators' estates, a judgment not docketed pursuant to this statute is to be considered only as a simple-contract debt; and, on the issue of *plene administravit*, the executor may give in evidence that he has applied all the assets in payment of bond or simple-contract debts before the commencement of the action. 2 Wms. on Exec. 4th ed. 859; *Heckey v. Hayter*, 6 T. R. 384; *Hall v. Tupper*, 3 B. & Ad. 655; *Landon v. Ferguson*, 3 Russ. Chan. Cas. 349; 2 Saund. 9 c, 6th ed.

assets, and it is not necessary to allege in his plea that there was no docket (u).

An executor or administrator may plead in bar to a *scire facias* that he has fully administered *die impetrationis* of the *scire facias* (x).

The *scire facias* must pursue the terms of the judgment.

A *scire facias* on a judgment must pursue the terms of the judgment: and, therefore, where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; and if it pray execution of assets generally, without confining it to that time, it cannot be supported. But if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and the judgment, the Court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term when he could, at the soonest, have entered it up; unless the defendant can show that, in point of fact, some injustice will be done by it in the particular case (y).

A plea by the executor to the *scire facias*, that a writ of error is pending on the judgment, is bad; for the object of the *scire facias* is to make the executor party to the judgment; and the Court, in awarding the execution as prayed, does not say that it shall be immediately enforced (s). The writ of error suspends nothing but the execution, and cannot be a final bar to a proceeding by *scire facias* (z).

No damages for delay of execution can be given in a *scire facias*; nor could costs in any case until the stat. 8 & 9 Will. III. c. 11, s. 3. The 5th section of that stat. provides, "that nothing herein contained shall be construed to alter the laws in being, as to executors or administrators, in such cases where they are not at present liable to the payment of costs of suit." But now, by stat. 3 & 4 Will. IV. c. 42, s. 34, it is enacted, "that in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded, or demurrer joined (a). In a case, before the stat. of Will. IV., where

(u) See 2 Vict. c. 11; *Hall v. Tupper*, 3 B. & Ad. 655; *Cash v. Cock*, 2 Dowl. 3.

(x) Com. Dig. tit. Pleading, 3, l. 12.

(y) *Mara v. Quin*, Ex. 6 T. R. 1. See *post*, next Chapter.

(z) *Snook v. Mattock*, 5 Ad. & Ell. 239; S. C., 6 Nev. & M. 783; 2 Wms. on Exec. 4th ed. 1703; 2 Wms. Saund. 6th ed. 72 cc, n. (k).

(a) 2 Wms. on Exec., 4th ed. 1704; *Id.* 1695.

there was a judgment for costs in a *scire facias* against an executor, it was held that the judgment was only erroneous in that part, and therefore might be reversed as to the costs, and affirmed as to the residue (*b*). Where, after a plaintiff had obtained judgment, a writ of error was brought, and the plaintiff then died, and the judgment was affirmed in the Exchequer Chamber, without the record being perfected, the plaintiff's representatives were held to be entitled to issue their *scire facias* to be made parties to the record, and to have judgment signed upon that *scire facias*; but a stay of execution will in such a case be granted for six weeks, or other reasonable time, to enable the defendant, if he think fit, to sue out his writ of error in the House of Lords (*c*).

After the plaintiff has obtained judgment and execution against the executor in *scire facias* he may bring an action of debt in the *debet* and *detinet* against the executor, suggesting a *devastavit*; and in such action the judgment in *scire facias* is conclusive against the defendant that he has assets: therefore he cannot plead *plene administravit*, and the judgment shall be *de bonis propriis* (*d*). However, if the plaintiff please, he may bring the action in the *detinet* and take judgment *de bonis testatoris* (*e*).

Where the action is against the executor of an executor, suggesting a *devastavit* by the former executor, the action is in the *detinet* only, and the judgment is *de bonis testatoris* (*f*).

As to a *scire facias* to have execution against an executor or

(*b*) *Bellew v. Aylmer*, 1 Stra. 188.

(*c*) *Riddle, Executor of Hall, v. The Proprietors of the Grantham Canal Navigation Company*, 16 M. & W. 982.

(*d*) *Hope v. Bague*, 3 East, 2.

(*e*) *Ib.*; 2 Wms. on Exec., 4th ed. 1704.

(*f*) 2 Wms. Saund. 6th ed. 219 *f*. Formerly it was the practice, on judgment being obtained against an executor, or on the judgment against the testator being revived by *scire facias*, to issue a special writ of *fi. fa. de bonis testatoris*, in which a *devastavit* by the executor was suggested, and the sheriff was directed to inquire by a jury whether the executor had wasted the goods, and if the jury found he had, then a *scire facias* was sued out against him; and, unless he made a good

defence thereto, execution was awarded against him *de bonis propriis*. Afterwards, for the sake of expedition, it became the practice to incorporate the *fi. fa.* inquiry and *scire facias* into one writ, thence called a *scire fieri* inquiry, a name compounded of the first words of the two writs of *scire facias*, *fieri facias*, and that of inquiry, of which it consisted. 1 Wms. Saund. 219 *a*, 6th ed. But the present practice is to bring an action of debt on the judgment against the executor or administrator, suggesting a *devastavit*; on succeeding in which, execution goes against the property or person of the defendant as in ordinary cases. 1 Wms. Saund. 219 *a*; *Ward v. Thomas, Executor*, 2 Dowl. P. C. 87; 2 Tidd's Prac. 8th ed. 1165.

administrator on a judgment against the future effects of the testator or intestate *quando acciderint*, see the following chapter (g).

Where the executor or administrator of a sole plaintiff or defendant has died after judgment by or against the testator or intestate, and before execution.

Lastly, of the cases where the executor or administrator of a sole plaintiff or defendant has died after judgment, by or against the testator or intestate and before execution, and of administration de bonis non.—The personal representatives of a deceased plaintiff or defendant are his executor or administrator; or, if there be more than one, his executors or administrators and the survivors of them; and the executor of an executor is considered as the representative of the first testator (h); therefore a *scire facias* may be sued out either by or against the executor of an executor who has proved the will (i). But an administrator of the executor does not represent the testator, nor does the executor or administrator of an administrator represent the first intestate (k). Therefore a *scire facias* cannot be sued out by or against either of them to revive the judgment (l), but in that case there must be taken out administration *de bonis non* as it is called, that is, of such goods as are left unadministered by the executor or administrator (m). This administrator *de bonis non* will, when appointed, be the only representative of the party deceased (n). In a *scire facias* on a judgment recovered by an executor the death of the testator need not be expressly averred (o).

Of administration de bonis non.

Scire facias against administrator de bonis non.

If a judgment be recovered against an executor who dies intestate, a *scire facias* will lie upon the judgment against the administrator *de bonis non* of the testator (p), for he comes in the place of the testator, and being for a debt of the testator he is liable thereto; but an administrator *de bonis non* could not have a *scire facias* upon a judgment obtained by the executor of the testator, but was put to a new action, for he came in paramount the judgment and was no party thereto. But now, by statute 17 Car. II. c. 8, an administrator *de bonis non* may have a *scire facias* on a judgment by or in the name of any executor or administrator (q).

(g) *Post*, p. 200.

(h) 2 Tidd's Prac. 8th ed. 1172.

(i) 2 Saund. 72 r, 6th ed.; 2 Wms. on Exec. 4th ed. 1710; *Ibid.* 207.

(k) *Tingrey v. Brown*, 1 Bos. & Pul. 310.

(l) 5 Rep. 9 b.

(m) 2 Saund. 6th ed. 72 r; 2 Tidd's Prac. 8th ed. 1172; 2 Wms. on Exec. 4th ed. 1710.

(n) Wms. on Exec. 4th ed. 388; 2 Chitty's Arch. 8th ed. 1014.

(o) *Morfoot v. Chivers et. Uxor*, 1 Stra. 631; S. C., 2 Ld. Raym. 1395; 2 Tidd's Prac. 8th ed. 1173.

(p) 1 Roll. Abr. 890; *Snape v. Norgate*, W. Jon. 214; S. C., Cro. Car. 167.

(q) *Clerk v. Withers*, 6 Mod. 290; S. C., 1 Salk. 323.

That stat., sect. 2, enacts, that "where any judgment after a verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias* and take execution upon such judgment." It has been held in the construction of this statute, that since an administrator *de bonis non* may, by virtue of the Act, issue a *scire facias* to have execution on a judgment obtained by an executor or administrator, it is within the equity of the Act that he may have execution on a *scire facias* already issued by the executor or administrator (*r*), for the right now comes to him. Therefore, if the sheriff, before the death of the original executor or administrator, have returned that he has seized goods to the value, but that they remain in his hands *pro defectu emptorum*, and then the executor or administrator die, the sheriff must sell the goods in convenient time, and bring the money into Court; and upon the administrator *de bonis non* coming in and showing his letters of administration, he shall take it out (*s*). But still, if an executor bring a *scire facias* on a judgment or recognizance, and have judgment *quod habeat executionem* and die intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in the *scire facias* (*t*). So, if judgment be recovered against an executor or administrator who dies, a *scire facias* lies upon it against the administrator *de bonis non*, &c. being also administrator of the executor (*u*).

In a *scire facias* on a judgment recovered by an executor it is not necessary to state the death of the testator (*x*).

Where an administrator or executor obtains a decree and dies, the administrator *de bonis non* may revive this decree within the equity of the statute (*y*).

(*r*) 2 Saund. 6th ed. 72 *s*; 1 Wms. on Exec. 767; Bac. Abr. tit. Execution, F.

(*s*) 2 Ld. Raym. 1074, 1076; *Clerk v. Withers*, 6 Mod. 300.

(*t*) *Treviban v. Lawrence*, 2 Ld. Raym. 1049; 2 Saund. 6th ed. 72 *s*; 1 Wms. on Exec. 767.

(*u*) Com. Dig. tit. Pleader, 3, L, 6; Cro. Car. 167; *Snape v. Norgate*, *Norgate v. Snape*, W. Jon. 214; 2

Chitty's Arch. 8th ed. 1014.

(*x*) *Morfoot v. Chivers and Wife*, 1 Str. 632; S. C. 2 Ld. Raym. 1395; see the Forms, Co. Ent. 617 *a*, 618 *b*; Lill. Ent. 638, 639, 640, 645, 659; and Tidd's Prac. Forms.

(*y*) 1 Wms. on Exec. 4th ed. 767; *Owen v. Curzon*, 2 Vern. 237; *Hugins v. York Building Company*, 2 Equity Cases Abridged.

CHAPTER VI.

OF SCIRE FACIAS AGAINST AN EXECUTOR OR ADMINISTRATOR
ON A JUDGMENT OF ASSETS QUANDO ACCIDERINT.

*Plea of Plene Administravit by
Executor or Administrator, p.*
200.

Judgment of Assets quando, p. 200.
Form of, p. 200.

*Prayer of this Judgment an Ad-
mission by Plaintiff that no
Assets in Defendant's Hands at
Time of Commencement of Suit,*
p. 201.

*Action of Debt or Scire Facias for
future Assets, p. 201.*

*Formerly the future Assets had
Relation from the Time of Judg-
ment signed, p. 202.*

*But now the future Assets date
from the Time of the Commence-
ment of the Suit, p. 203.*

*Practice on Issue joined on Plene
Administravit pleaded, p. 203.*

*The Scire Facias must pursue the
Terms of the Judgment, p. 203.*

*Practice after Plea of Plene Ad-
ministravit Præter on Judgment
quando, &c., p. 204.*

*Scire Facias on Judgment of Assets
quando acciderint in a County
Court, p. 204.*

Costs, p. 205.

Forms, p. 205.

Plea of
plene ad-
ministravit
by executor
or adminis-
trator.

Judgment
of assets
quando.

Form of.

If a creditor seek to recover his debt from the representatives of a deceased debtor, the heir of such debtor may plead *riens per descent* (a), or his executor or administrator may plead *plene administravit* to the action; and it is then in the option of the plaintiff either to take issue on such plea and go to trial on the facts (b); or, if he have reason to believe such a plea to be true, he may admit its truth and enter up judgment of assets *quando acciderint*, which he has a right to do before trial (b), praying that his debt may be levied of such assets as may *afterwards* (c) come to the hands of the heir, executor, or administrator, to be administered (d). The form of a plaintiff taking judgment of assets *in futuro* in an action against an executor, (the plea of *plene administravit* having admitted the debt of the testator or intestate, and alleged that the defendant as executor or adminis-

(a) 3 Ch. Pl. 6th ed. 860.

(b) *Lucas v. Tanner*, 2 Dowl. 64; 2
V. Wms. Saund. 216 a, n. (1).

(c) That is, at any time "after the

commencement of the suit;" *Smith v.*
Tateham, 2 Exch. Rep. 205; see *post*.

(d) *Per Lord Kenyon, C. J., in*
Mara v. Quin, 6 T. R. 5.

trator has fully administered all the deceased's goods and chattels which have ever come to his hands as executor or administrator to be administered, and that the defendant as such executor or administrator has not, nor had at the time of the commencement of the suit, any goods or chattels of the deceased to be administered (e)—is, that the plaintiff "prays judgment of his debt aforesaid, by him above demanded, to be levied on the goods and chattels which were of the said ——— (the testator or intestate) at the time of his death, and which shall *hereafter* (f) come to the hands of the said defendant, as such executor (or administrator) as aforesaid to be administered. Therefore it is considered that the said plaintiff recover against the said defendant his debt aforesaid, to be levied on the goods and chattels which were of the said ——— (the testator or intestate) at the time of his death, and which shall *hereafter* (g) come to the hands of the said defendant to be administered" (h). The praying of this judgment is an admission by the plaintiff that there were no assets in the executor's hands at the time of the commencement of the suit (i). Should assets *afterwards* come into the hands of the executor to be administered, the plaintiff may either have his action of debt on this judgment, or he may have a writ of *scire facias* to have execution of the judgment (k); but in either case, proof of the executor's receiving assets is at the trial now held to be confined to a period subsequent to the commencement of the action (l). And it is right that such should be the rule of law, for if a creditor were permitted to litigate a second time that which has been once settled between the parties, either by verdict or admission, an executor would be harassed and involved in infinite expense and litigation" (m). And, in *Dorchester v. Webb* (n), it was held that the admission of the truth of the plea of *plene administravit* operated as a bar to the creditor's claiming any other assets than those that the executor should afterwards receive.

Prayer of this judgment admission by plaintiff that no assets in defendant's hands at time of commencement of suit.

Action of debt or *scire facias* for future assets.

(e) 3 Ch. Pl. 6th ed. 810; *Noell v. Nelson*, 2 V. Wms. Saund. 216.

(f) That is, "from the time of the commencement of the suit; see *post*, *Smith v. Tateham*, 2 Exch. Rep. 205.

(g) See *post*, *Smith v. Tateham*, 2 Exch. Rep. 212.

(h) *Noell v. Nelson*, 2 V. Wms. Saund. 216 a.

(i) *Smith v. Tateham*, 2 Exch. Rep. 212.

(k) *Dorchester v. Webb*, Cro. Car.

373; 2 Chitty's Arch. Prac. 8th ed. 1021; *Hancocke v. Prowd*, 1 V. Wms. Saund. 366 b; Towns. 2nd Judgments, 68, pl. 29; 2 Wms. on Exec. 4th ed. 1174.

(l) *Id.* Formerly it was held to be subsequent to the judgment; *Taylor v. Holman*, Bull. N. P. 169; Bac. Abr. tit. *Scire Facias*, D, 149; *Noell v. Nelson*, 2 V. Wms. Saund. 216 a.

(m) *Mara v. Quin*, 6 T. R. 6.

(n) Cro. Car. 373.

Formerly
the future
assets had
relation
from the
time of
judgment
signed.

In the case of *Mara v. Quin* (o), Lord Kenyon observed that it had occurred to him, on looking into the precedents, that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct; for, as on the issue of *plene administravit* no evidence could be given of assets after the writ sued out, if the judgment were only to affect assets received after judgment, there was an interval between the commencement of the action and the judgment, in which, if the executor received any assets, they would not be taken at all. His Lordship therefore thought that the judgment in such a case ought to be entered up in such a manner as to reach all assets received by the executor after the time of suing out the writ. Upon which Mr. Justice Ashurst stated, that as the plea of *plene administravit* was that "the executor hath not, nor had at the time of suing out the writ, nor at any time since, any assets," &c., he saw no objection to the plaintiff replying to the latter part of the plea "*that the executor had assets since*," &c., if the facts were so (p).

Acting on the suggestion of Mr. Justice Ashurst in *Mara v. Quin*, which was adopted as law by the text-writers, by whom it has been laid down that, "under the issue of *plene administravit* the plaintiff could not prove that assets had been received subsequently to the commencement of the suit, and that to be admitted to such proof he should reply this matter specially" (q), such a replication was framed in *Smith v. Tateham and another* (r). In that case the plaintiff replied that after the plea of *plene administravit præter* by the defendants, divers goods and chattels of the deceased came to the hands of the defendants in value over and above the amount of the cause of action in the declaration mentioned, and of the debt in the plea mentioned, with which the defendants ought to have satisfied the causes of action in the declaration mentioned; concluding with a verification. This replication was demurred to, and after argument was held bad on the ground that by such a mode of pleading the pleadings might be indefinitely prolonged, as the defendants might rejoin *plene administravit*, or *plene administravit præter*, and to that the plaintiff might sur-rejoin that since the last pleading additional assets had come into the executor's hands, and so on *ad infinitum*; and because if the defendants did not rejoin, they might be liable to

(o) 6 T. R. 10.

(p) 2 Wms. on Exec. 4th ed. 1677.

(q) 2 Wms. on Exec. 4th ed. 1677;

2 Phillips on Ev. 6th ed. 347; Roscoe on Ev. 4th ed. 59.

(r) 2 Exch. Rep. 205.

judgment by default, and to costs *de bonis propriis*, which would be unjust where they had a good answer to the action when brought, and would introduce a new practice by allowing such a judgment with costs payable *de bonis propriis*; and so if the defendants were to traverse the averment of assets since the last pleading, and the issue were found against them. In that case the Court of Exchequer decided that "the proper course is to take judgment of *assets quando*, which seems sufficient to embrace not only those assets which were actually received by the hands of the executors after the time when judgment is signed, *but also those which came between the issuing of the writ, or the plea and the judgment, and which are, or ought to be, in their hands in the due course of administration after judgment*" (s). And that "*it is immaterial whether the assets have come into the executors' hands at a period antecedent to or posterior to the judgment, provided they have come since the commencement of the suit*" (t).

But now the future assets date from the time of the commencement of the suit.

Formerly if on issue joined on a plea of *plene administravit*, it was found by the verdict that the executor had assets sufficient to satisfy part of the debt, the practice of the Court of King's Bench was to enter up judgment for the whole debt, but to take out execution only for the sum found by the verdict; and if the executor was afterwards possessed of more assets, to sue out a *scire facias* on the judgment (u). But now the practice is to take a verdict on the plea of *plene administravit* for the amount of the assets proved to be unadministered, if they amount to part only of the plaintiff's demand, and judgment *quando acciderint* for the residue of the debt (x).

Practice on issue joined on *plene administravit* pleaded.

Where upon a suggestion of assets a *scire facias* was taken out, and assets were found for part, judgment was given to recover so much immediately, and the residue of assets *in futuro* (y).

The *scire facias* must pursue the terms of the judgment on which it is founded (z); and it was therefore formerly held to be necessary to state in the writ of *scire facias* that the assets came to the executor's hands *after* the judgment, the terms of the judg-

The *scire facias* must pursue the terms of the judgment.

(s) *Per Parke, B.*, p. 209.

(t) *Per Rolfe, B.*, p. 210.

(u) Bro. Exec. 34; 1 Roll. Abr. 929 (B), pl. 1; *Waterhouse v. Woodstreet*, Cro. Eliz. 592; *Snape v. Norgate*, Cro. Car. 167; *Dorchester v. Webb*, Cro. Car. 373; *Hancocke v. Prowd*, 1 V. Wms. Saund. 336; *Shipley's case*, 8 Co. 134.

(x) *Hancocke v. Prowd*, 1 V. Wms. Saund. 6th ed. 336; *Harrison v. Beccles*, quoted in *Irving v. Peters*, 3 T. R. 688.

(y) *Perryman v. Westwood*, cited in 1 Vent. 95; and 1 Sid. 448.

(z) *Panton v. Hall*, 2 Salk. 598; *Rex v. Young*, 2 Anst. 448; *Blackwall v. Ashton*, Aleyn, 21.

ment being, "that the plaintiff do recover his debt to be levied of the goods of the testator which shall *thereafter* come to the hands of the executor." Therefore, where a *scire facias* on such a judgment as this of assets, *quando acciderint*, stated that divers goods, &c. of the testator, sufficient to pay, &c., had come to and were in the hands of the defendant, to be administered, &c., without stating that those goods had come to the defendant's hands *since the judgment*, and prayed execution against the defendant to be levied of those goods according to the form and effect of his said recovery, &c.; the defendant pleaded that *after the plaintiff's judgment*, no goods, &c. of the testator had come to the defendant's hands to be administered, &c.; to which the plaintiff replied that divers goods, &c. had come to the defendant's hands, without adding *since the judgment*; and on demurrer it was adjudged that the *scire facias* was wrong for want of the words "after the judgment" (a). Since, however, the decision in *Smith v. Tateham* (b), it would seem that the word "thereafter" in the terms of the judgment, if the same form be adhered to, will have reference to the time of *the commencement of the suit*, and not to the time of signing judgment; Mr. Baron Rolfe, in delivering judgment in the above case, stating that "all assets in the executor's hands at that time (at the time of the judgment, and which have come since the commencement of the suit) unadministered are liable to, and are reached by this judgment" (c).

Practice after plea of plene administravit præter on judgment quando, &c.

There is a difference as to the application of the future assets, where the plaintiff has signed judgment of *quando acciderint*, after a plea of *plene administravit præter* judgments; for in the latter case those judgments must be satisfied before the plaintiff's demand on the judgment of assets *de futuro* can be paid off (d).

Scire facias on judgment of assets

So if a plaint be levied in the County Court against an executor, and he plead *plene administravit*, and the plaintiff take judgment of assets *quando acciderint*, the proper course to recover such assets is by issuing a summons out of the County Court, in a form analogous "to that of a *scire facias*." In *Ellis v. Watt*, executor (e), where after judgment of assets *quando acciderint*, on a plea of *plene admi-*

(a) *Noell v. Nelson*, 2 Wms. Saund. 6th ed. 219, n. 2; Wms. on Exec. 4th ed. 1705.

(b) *Ante*.

(c) *Smith v. Tateham*, 2 Exch. Rep. 212.

(d) *Hancocke v. Prowd*, 1 Wms.

Saund. 6th ed. 336 b; *Parker v. Atfield*, 1 Salk. 312; *Poulett v. Wightman*, 1 Bligh, N. S. 138; Wms. on Exec. 4th ed. 1705; (see references to Forms, *post*, Append.).

(e) *Ellis v. Watt*, Exec. 19 L. J., N. S., C. P. 113.

mistravit in a County Court, it was held that the proper method of proceeding for assets received by the defendant since plea pleaded, is not by a suggestion of a *devastavit*, but by a summons in a form analogous to that of a *scire facias*, stating the judgment *quando*, and suggesting assets after plea pleaded.

Where an executor pleads the general issue and *plene administravit*, if he should succeed, on either plea going to the whole cause of action, he will be entitled to the general costs (*f*). But if the plaintiff, instead of traversing the plea of *plene administravit*, take judgment of *assets quando acciderint*, and the other pleas are found for him, then he will be entitled to the general costs, *de bonis testatoris*, &c. *et si non de bonis propriis* (*g*). Because if the defendant had pleaded a plea of *plene administravit* only, the plaintiff might have taken judgment of *assets quando* without incurring the costs of a trial, but the defendant by pleading the general issue compelled the plaintiff to incur those costs (*g*); and as it was a plea which the defendant could not support, it is right that he should pay them, if he have not assets of the testator's sufficient for that purpose (*h*). But if the action be against the heir for the debt of his ancestor, and the defendant plead the general issue and *riens per descent*, if the plaintiff succeed on the issues, he can only have execution for debt and costs to the value of the lands descended under the 5th and 6th sections of the statute of 3 & 4 Will. & Mary, c. 14 (*i*).

If, however, an executor have a defence to the action, and he neglect to plead it at the time in bar to the action, he cannot afterwards take advantage of it by plea to the *scire facias* (*k*).

For references to forms of *scire facias* on a judgment of assets *quando acciderint*, see the Append. post.

(*f*) *Hogg v. Graham*, 4 Taunt. 135 ;
Edwards v. Bethell, 1 B. & Ald.
 254 ; *Iggulden v. Terson*, 2 Dowl.
 277 ; 1 Wms. Saund. 6th ed. 336 *b*,
 n. (*m*).

(*g*) *Marshall v. Wilder*, 9 B. & C.
 655.

(*h*) *Ibid. per Littledale, J.*, p. 658 ;
 and see *Hindsley v. Russell*, 12 East,
 232 ; *Cox v. Peacock*, 4 Dowl. 134.

(*i*) *Brown v. Shaker and others*, 2
 Cr. & J. 311.

(*k*) *Earle v. Hinton*, 2 Stra. 722.

CHAPTER VII.

OF SCIRE FACIAS WHERE A BILL OF EXCEPTIONS HAS BEEN SEALED, TO THE JUDGE WHO SEALED IT, OR IN CASE OF HIS DEATH TO HIS EXECUTORS OR ADMINISTRATORS TO ACKNOWLEDGE OR DENY HIS SEAL.

Brief Review of the Origin of the Bill of Exceptions, p. 206.
The Stat. Westminster 2, 13 Edw. I. c. 31, p. 207.
Where it lies, p. 208.
Thought not to lie in Criminal Cases, p. 209.

Proceedings on the Bill, p. 210.
Scire Facias to the Judge who sealed it, p. 211.
Scire Facias to Executors or Administrators of Judge to certify his Seal, p. 212.

Brief review
of the origin
of the Bill of
Exception.

BEFORE the passing of the Statute of Westminster the Second (a), a writ of error for an error in law lay at common law for any erroneous decision of a judge on matters of law occurring in the course of a cause, only where the erroneous decision appeared upon the record (b). At that time, the pleadings in the superior Courts were stated *ore tenus* by the counsel at the bar of the Court, in the presence of the judges (c); in the progress of which, if any pleading were stated, which, in the opinion of the Court, was insufficient, it was overruled (d). During this oral altercation, a contemporaneous official minute in writing was drawn up by one of the officers of the Court on a parchment roll, containing a transcript of all the different allegations of fact to the issue inclusive, and of the acts of the Court itself during the progress of the pleading (e). The practice of the Courts was not in general to allow any entry to be made of any matter overruled or disallowed by them, or any statement of the fact of its having been overruled or disallowed. The proceedings entered on the parchment roll were those only of which the Court finally approved, and upon which the parties were compelled to abide the judgment of

(a) 13 Edw. I. c. 31.

(b) Bacon's Abr. tit. Bill of Exceptions; 2 Inst. 427. The writ of error only lies upon matter of law, arising upon the face of the proceedings, so that no evidence is required to substan-

tiate or support it, Bla. Com. vol. 3, p. 406.

(c) 2 Inst. 427; 2 Reeves, 344; Steph. on Pl. 23, App. n. 6.

(d) See instances in 2 Reeves, 344.

(e) Steph. on Pl. 5th ed. 25.

an inquest, or of the Court, according to circumstances, whether as to a point of law, or of fact (*f*). The official minute of the pleading and other proceedings thus made on the parchment roll was called the record; which, when complete, was the exclusively admissible testimony of all the judicial transactions which it comprised (*g*). The mischief and inconvenience of this state of the law was, that however well founded any objection might be, in the opinion of the counsel of either of the parties who urged it, to the conduct of the cause by the opposite party, if the Court overruled it, neither plaintiff nor defendant had power to cause any entry of it to be made on the record (*h*); and as no error could be afterwards assigned for matters which did not appear on the face of the record, the party grieved was therefore without remedy (*i*).

The Statute of Westminster the Second (*k*), was passed to remedy this injustice; and in substance enacted, as has been subsequently decided, that in any action, real, personal, or mixed (*l*), in any trial at bar (*m*), or at *nisi prius* (*n*), or in any of the superior or inferior Courts, whose proceedings are according to the course of the common law (*o*), and whether of record or not (*p*); either

The Stat.
Westminster 2, 13 Ed.
1, c. 31.

(*f*) Mr. Raymond's Book on the Bill of Exceptions, p. 4; 2 Reeves's Hist. 347—349.

(*g*) Steph. on Pl. 5th ed. 25.

(*h*) 3 Bla. Com. 406; Raymond on the Bill of Exceptions, p. 4.

(*i*) *Bulkeley v. Butler*, 2 B. & C. 445; per Best, J., Co. 2 Inst. 427. "Now the mischief before the statute was, that when the demandant or plaintiff, or the tenant or defendant, did offer to allege any exception (as in those days they did *ore tenus* at the bar), praying the justices to allow it, and the justices overruled it, so as it was never entered of record; this the party could not assign for error, because it neither appeared within the record, nor was there any error in *fact* but in law; and so the party grieved was without remedy.

(*k*) 13 Edw. I. c. 31.

(*l*) 2 Inst. 427.

(*m*) *Rex v. Preston-on-the-Hill*, 2 Stra. 1040; Ca. temp. Lord Hardwicke, 249, S. C.; *Enfield v. Hall*, 2 Lev. 237; *Thurston v. Slatford*, 3

Salk. 155; 2 Inst. 427.

(*n*) 2 Edw. IV. 66; *Enfield v. Hall*, 2 Lev. 237; 2 Tidd, Pr. 8th ed. 911; see *vide Newton v. Boodle*, 3 C. B. 803; per Wilde, C. J.

(*o*) *Strother v. Hutchinson*, 4 Bing. N. C. 83; S. C., 6 Dowl. 238.

(*p*) *Ibid.* and see 2 Inst. 427. "And this Act extendeth not only to all other Courts of record [besides the C. P.] (for upon judgments given in them a writ of error lyeth in the King's Bench) but to the County Court, the hundred, and the Court Baron, for therein the judges were more likely to erre; and albeit of judgements given in them a writ of error lyeth not, but a writ of false judgment in the Court of Common Pleas; yet the case being in the same or greater mischief, the purview of this statute doth extend to those inferior Courts." It has been held not to extend to a Court of Quarter Sessions (*Rex v. Inhabitants of Preston*, Ca. temp. Hardw. 249) or to a judge sitting at chambers (Raymond, on the Bill of Exceptions, p. 27).

party whose pleading is overruled, or whose exception is disallowed, is himself, at the trial, and before verdict (*g*), to write a statement of the facts, and to require the judge (*r*) to put his seal to it; which, if the statement be correct, he is bound and may be compelled to do (*e*). This statement, so sealed, is ultimately, on the judge acknowledging his seal, to form part of the record, and as such is of course liable to the revision of a Court of error (*u*).

Where it
lies.

This written statement is called a "bill of exceptions." And it lies for disallowing a challenge to the array (*x*), and extends to all challenges of any jurors (*y*), and for disallowing a challenge to the polls (*z*); for refusing to allow matter pleaded in abatement to be pleaded in bar (*a*); for disallowing a plea in bar (*b*); for disallowing a plea in abatement (*c*); for refusing to receive a replication, or to allow it to be entered on the record (*d*); for refusing to inquire whether a return was made by the proper party (*e*); for refusing a view (*f*); for the improper reception of evidence (*g*);

(*g*) *Wright v. Sharp*, 2 Salk. 288; *Gardner v. Baillie*, 1 B. & P. 33; *Culley v. Doe d. Taylerson*, 11 Ad. & Ell. 1013.

(*r*) *Strother v. Hutchinson*, 4 Bing. N. C. 83; 3 Bla. Com. 372.

(*e*) Bull. N. P. p. 316; *Rowe v. Brenton*, 3 M. & R. 266; 2 Inst. 427; *Bridgeman v. Holt*, Show. P. C. 122.

(*u*) Raym. on the Bill of Exceptions, p. 9; and see 2 Chit. Arch. Prac. 8th ed. 431. The statute of 13 Edw. I. c. 31, is as follows:—"When one that is impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which if they will not allow, if he that alleged the exception do write the same exception, and require that the justices will put to their seals for a witness, the justices shall so do; and if one will not another shall; and if the King, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written, with the seal of a justice put thereto, the justice shall be commanded that he appear at a certain day, either to confess or deny his seal; and if the justice cannot

deny his seal, they shall proceed to judgment according to the same exception as it ought to be allowed or disallowed." (2 Inst. 427; Bac. Abr. tit. Bill of Exceptions.)

(*x*) 9 Lib. Ass. pl. 8; *Lord Paget and Bishop of Coventry's case*, 1 Leon. 5; *Rex v. Higgins and another*, 1 Vent. 366.

(*y*) 2 Inst. 427.

(*z*) 21 Edw. IV. 12 b; *Sir John Barkley v. Phillips*, Dy. 231 b.

(*a*) 5 Hen. VII. 40.

(*b*) 2 Edw. IV. 6 b.

(*c*) 2 Edw. IV. 53.

(*d*) *Rous v. Wright*, Brownl. Ent. 136.

(*e*) 11 Hen. IV. 52, 65, 92.

(*f*) 10 Hen. VII. 8.

(*g*) 27 Hen. VIII. 24, 25; *Thurston v. Slatford*, 1 Salk. 284; *Searle v. Lord Barrington*, 2 Stra. 827; *Bishop of Meath v. Lord Belfield*, 1 Wils. 215; *Mostyn v. Fabrigas*, Cowp. 161; *Marston v. Fox*, 8 Ad. & E. 14; *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 749; *Exfield v. Hall*, 2 Lev. 237; *Davies v. Lowndes*, 4 Bing. N. C. 478; *Phillips v. Bateman*, 16 East, 362; Brownl. Ent. 129, &c. &c.

and for its improper rejection (*h*); for directing the jury that there is evidence to prove the issue to be tried when there is not (*i*); for directing a nonsuit (*k*); for disallowing a demurrer to evidence (*l*); for misdirection (*m*); for refusing to direct a jury to find a special verdict (*n*); and in fine, to any direction in the course of a cause in which the judge may be mistaken (*o*), and which does not in its nature come upon the record (*p*).

It has been determined (*q*), or rather, it has been thought (*r*), ^{Thought not to lie in criminal cases.} though on what principle it is difficult to discover, that the statute does not extend the right to tender a bill of exceptions to criminal cases. The reasons assigned are, that criminal trials do not come within the terms of the stat. "*cum aliquis implacitatur*;" and that, if allowed, they would be attended "with great inconvenience, because of the many frivolous exceptions that might be put in by prisoners to the delay of justice" (*s*)—which surely is a most frivolous reason.

"Justice" is not one-sided; and an erroneous ruling by a judge in a case where a man's character or liberty, or it may be his life, is at stake on the decision, without his having the power of right to call in question that ruling, would seem to be within the very grievance which the statute of Edward was passed to remedy. There is scarcely any one of the instances enumerated, in which

(*h*) *City of London v. Unfree Merchants*, 2 Show. R. 146; *Symmers v. Regem*, Cowp. 489; *Anon.* Mod. 53; *Strode v. Palmer*, Lill. Exch. 250, &c. &c.

(*i*) *Bulkeley v. Butler*, 2 B. & C. 445.

(*k*) *Strother v. Hutchinson*, 4 Bing. N. C. 83; *S. C.*, 6 Dowl. 238, in which latter report of this case, Lord Chief Justice Tindal is reported to have said, a bill of exceptions "is not confined merely to errors in directing the jury, or to the improper reception, or rejection of evidence; but it is extended to any directions of the judge at any time in the course of the cause by which the judgment is affected; as, for instance, the refusing or improperly allowing a challenge of a juror. This, and other points, are such as form the subject of a bill of exceptions, for they cannot otherwise

be questioned, as they do not appear on the record."

(*l*) *Cart v. Bishop of St. David's*, Cro. Car. 341.

(*m*) *Chichester v. Phillips*, Sir T. Raym. 404; *Davenport v. Tyrrel*, 1 W. Bla. 675; *Culley v. Doe*, 11 Ad. & E. 1008; *Rutter v. Chapman*, 8 M. & W. 13; *Lord Truntestown v. Kemmis*, 9 Cl. & Fin. 749.

(*n*) *Brownl.* Exch. 135.

(*o*) *Per* Tindal, C. J., in *Strother v. Hutchinson*, 4 Bing. N. C. 90.

(*p*) *Lessee of Lawlor v. Murray*, 1 Sch. & Lef. 82, *per* Lord Redesdale. And see the cases collected in Raym. on the Bill of Exceptions, p. 30.

(*q*) *Sir Henry Vane's Case*, 1 Lev. 68; 1 Sid. 84.

(*r*) 2 Hawk. P. C. ch. 46, sec. 198.

(*s*) *Ibid.* and see 1 Bac. Abr. 779, tit. Bill of Exceptions.

it has been decided that a bill of exceptions lies in a civil case, which may not occur in the course of a criminal trial; yet in the one case, although the matter in dispute may not be worth 5*l.*, either the plaintiff or the defendant has the *right* to tender his bill of exceptions to the ruling of the judge on any matter occurring in the course of the cause, which cannot otherwise appear on the record, and to have that decision canvassed in a Court of Error; and if not satisfied with the decision of the Court of Error, he may carry his case to the House of Lords; while in a criminal case, although a prisoner may be on trial for a crime affecting his life, if legally proved against him, the decision of the presiding judge is final on any objection raised in the course of the trial, which does not appear on the record, unless the judge, in his *discretion*, shall choose to reserve the point raised for the consideration of the Court of Criminal Appeal (*t*). As between plaintiffs and defendants and the Crown and prisoners, this can be scarcely called an even-handed application of the law, and to this practice the very unsatisfactory state of the criminal law, may in many instances be attributed (*u*).

A bill of exceptions has however been allowed in an indictment for a trespass (*x*), and in an information in the nature of a *quo warranto* (*y*): it has been refused in an indictment for a riot (*z*); it has been allowed by Lord Raymond at *nisi prius*, that it might be tendered in an indictment for a libel (*a*); and it was allowed by Lord Keeper Harcourt on proceedings in a suit by *scire facias* in the Petty Bag, to repeal a patent in which the Crown is a party (*b*).

Having thus briefly shown the nature of a bill of exceptions, and the instances in which any judge, trying causes in any Court whose proceedings are according to the course of the common law (*c*), may be called on to seal it, we come now to the means by which a judge, or, if dead, his executors or administrators, may afterwards be compelled to acknowledge his seal.

Proceedings
on the bill.

When sealed, the bill of exceptions is carried with the record

(*t*) 11 & 12 Vict. c. 78, s. 1.

(*u*) A writ of error, even in criminal cases, is not grantable *ex debito justitiæ*, but *ex gratiâ regis* merely, on a certificate of counsel that there is error on the record; *The Rioters' case*, 1 Vern. Rep. 174.

(*x*) *The Bishop of Coventry and Lichfield's case*, 1 Leon. 5.

(*y*) *Res v. Higgins and another*, 1 Vent. 366.

(*z*) *The Rioters' case*, 1 Vern. 175.

(*a*) *Res v. Bounce*, cited in Ca. temp. Hardw. 250; and in 1 Bac. Abr. tit. Bill of Exceptions, p. 779.

(*b*) See *post*, bk. iii. ch. ii. p. 269.

(*c*) *Strother v. Hutchinson*, 4 Bing. N. C. 83, *ante*.

into the Court of Error (*d*), the Court below not being competent to entertain it (*e*). It forms no part of the record till after judgment, when it is carried into a Court of Error by the party who tenders it, for whose benefit it is (*f*). A writ of *scire facias* then issues out of the Court where the record is (*g*) to the judge who sealed it, setting forth that the record and process have been removed into a Court of Error, and that at the trial the counsel of one of the parties alleged on his behalf certain exceptions to the opinion then declared by the judge, which were then and there written in a certain bill, to which the judge put his seal at the request of the said plaintiff in error, according to the form of the statute in such case made and provided; and the said plaintiff in error having brought into Court the said bill with the judge's seal to the same, the judge is commanded personally to appear in the said Court of Error, to confess or deny his seal. In answer to this writ the judge attends personally in Court, and confesses *ore tenus* his seal to the bill of exceptions (*h*); after which the bill of exceptions is ordered to be filed, and it is then annexed to the record (*i*), and becomes part of the record, on which error is assigned, and on which the Court of Error has to give judgment (*k*).

Scire facias
to the judge
who sealed
it.

If the bill of exceptions be not tacked to the record, it is necessary that the whole record should be set forth in it (*l*); but if tacked to the record, it then merely states the proceedings after issue joined (*m*).

The tendering of a bill of exceptions will not prevent the party tendering it, moving in term time to set aside the verdict, or for a nonsuit, or a new trial, on grounds *differing from the exceptions* (*n*).

(*d*) *Davenport v. Tyrrell*, 1 Bla. 675; *Searle v. Lord Barrington*, 2 Stra. 826.

(*e*) *Symmers v. Regem*, Cowp. 495, 501; *Rex v. Inhabitants of Preston*, Ca. temp. Lord Hardw. 249.

(*f*) *Gardner v. Baillie*, 1 Bos. & P. 33; *per Parke, B.*, in *Doe d. Dudgeon v. Martin*, 2 D. & L. 679.

(*g*) See *ante*, pp. 2, 19.

(*h*) See the form in *Money and others v. Leach*, 3 Burr. 1692; and in *Thurston v. Slatford*, Lut. 905, 906; *Davies v. Loundes*, 1 Sco. N. R. 328; *Chitty's Arch. Prac.* 8th ed. 431; see *post*, Append. reference to Form.

(*i*) *Ibid.* and see *Gardner v. Baillie*,

1 Bos. & P. 33; and see *Enfield v. Hall*, 2 Lev. 237; *Symmers and another, v. Regem*, Cowp. 501; 1 Bac. Abr. tit. Bill of Exceptions, 781.

(*k*) *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1014; *Chitty's Arch. Prac.* 8th ed. 432.

(*l*) *Chitty's Arch. Prac.* 8th ed. 431; see the Form, Bull. N. P. 317; *Tidd's F.* 327.

(*m*) See Form, Bull. N. P. 319; *Chitty's F.* 89; *Davies v. Loundes*, 1 Sco. N. R. 377; *S. C.* 1 M. & Gr. 473.

(*n*) *Pim v. Currell*, 6 M. & W. 267; *Allan v. Hayward*, 7 Q. B. 969.

The tendering of a bill of exceptions merely enables the party tendering it, if he should think fit, to prosecute it with reasonable diligence (o), to bring error on the record of which it forms a part, after it is sealed and tacked to it. If the bill of exceptions should become abortive by reason of the death of the judge before sealing it, the party tendering it will be allowed to move for a new trial, on the grounds of objection raised by the bill of exceptions (p).

If the judge deny his seal, the plaintiff in error may take issue thereupon, and prove it by witnesses (q).

Scire facias
to executors
or administrators
of
judge to
certify his
seal.

If a judge should die before he has acknowledged his seal, a *scire facias* lies to his executor or administrator to acknowledge or deny it (r).

If the party grieved be dead, his heirs, executors or administrators, according to the case, may have a writ of error upon the bill of exceptions (s), in which case it would seem that a *scire facias* would be required to make them parties under the rule in *Pennoyer v. Brace* (t).

If the judge should die before he has sealed the bill of exceptions, the law has provided no remedy for the party tendering it, and the bill will be abortive; but the ground of objection raised by the bill of exceptions may then be made the subject of a motion for a new trial, or for setting aside the verdict, or for a nonsuit (u). The practice as to issuing the writ, and the proceedings thereon are the same as in other cases (x).

(o) *Newton v. Boodle*, 3 C. B. 806;
per Wilde, C. J.

(p) *Newton v. Boodle*, 3 C. B. 807;
Nind v. Arthur, Mich. T., C.P., 1849; 7
D. & L. in which last case, Mr. Justice
Coltman having died, before he sealed
the bill of exceptions tendered at the
trial, the Court refused to allow the
Chief Justice to affix Mr. Justice Colt-
man's seal to the bill, by consent.

(q) 2 Inst. 428.

(r) 2 Inst. 428; 2 Wms. on Exec.
4th ed. 1505.

(s) *Ibid.*; Bac. Abr. tit. *Scire Facias*,
B.

(t) 1 Salk. 320; see references to
Forms, Append.

(u) *Newton v. Boodle*, 3 C. B. 807;
and see *Wind v. Arthur*, n. (p), ante.

(x) See the Chapters, ante.

CHAPTER VIII.

SCIRE FACIAS AD AUDIENDUM ERRORES ON CHANGE
OF PARTIES.

<p>Scire Facias ad Audiendum Erro- res on Change of Parties, p. 213.</p> <p>Scire Facias quare Executionem</p>	<p>non, now not necessary, p. 214.</p> <p>Not necessary in case of the Crown, p. 214.</p>
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THIS writ used formerly to be necessary for the plaintiff in error in the Court of Queen's Bench (as the parties had no day in Court after the record was removed) to give notice to the defendant to appear and plead. In practice, however, it was usual for the defendant in error, by consent, to take notice voluntarily of the assignment of errors, by pleading *in nullo est erratum* (a). Now, however, unless in case of a change of parties, the writ is abolished by R. G. H. T. 4 Will. IV. r. 13. That rule is as follows:—"No *scire facias ad audiendum errores* shall be necessary (unless in case of a change of parties), but the plaintiff in error may demand a joinder in error, or plead to the assignment of errors; and the defendant in error, his executors or administrators, shall be bound within twenty days after such demand to deliver a joinder or plea, or to demur, otherwise the judgment shall be reversed.

Provided that if in any case the time allowed, as heretofore mentioned, for getting the transcript prepared and executed for assigning errors, or for delivering a joinder in error, or plea, or demurrer, shall not have expired before the 10th day of August in any year, the party entitled to such time shall have the like time for the same purpose after the 24th day of October, without reckoning any of the days before the 12th of August.

Provided also, that in all cases such time may be extended by a judge's order.

Provided also, that in all cases of writs of error to reverse fines and common recoveries, a *scire facias* to the terretenants shall issue as heretofore (b). Where, therefore, there is a change of

(a) 2 Tidd's Pr. 8th ed. 1230; Forms, Tidd's Forms, ch. 44, § 63
Moseley v. Cocks, Carth. 40, 41; 2 64, et seq.; and see *St. Katherine's*
 Wms. Saund. 6th ed. 101 y. *Dock Company v. Higgs*, 10 Q. B. 652,
 (b) Jerv. N. Rules, 109; see the note.

parties on the record, this writ is still necessary, and in form it must follow the same rules as in other cases where there has been a change of parties by death or otherwise (c).

Not necessary in case of the Crown.

It has been held, however, that in the case of the Crown, the writ of *scire facias ad audiendum errores* is not necessary, "because the King is always presumed to be present in Court, *quod tota Curia concessit* ; and therefore there needs not any garnishment by *scire facias* " (d). So also in Fitz. Nat. Brev. (e) it has been laid down that "if a false judgment be given for the King in any suit or action, the party grieved shall have a writ of error, and assign his errors without suing forth any *scire facias* against the King *ad audiendum errores*, because the King is always present in Court." These decisions have been affirmed in the recent case of *The Baron de Bode v. Reg.* (f).

Scire facias quare executionem non now not necessary.

To compel the plaintiff to assign his errors and proceed, a *scire facias quare executionem non* was formerly necessary, to which if the plaintiff did not appear, but suffered judgment to go against him he might be *non prossed*, and no future assignment of errors would operate as a *supersedeas* to the execution (g). Now, however, this writ is abolished by a general rule of all the Courts of H. T. 4 Will. IV. r. 11, by which no such writ shall be necessary to compel an assignment of errors ; but the plaintiff must, within eight days after the delivery of the writ of error, in error to the Queen's Bench, or within twenty-one days after the allowance of the writ in other cases, assign errors, or the defendant in error will be entitled to sign judgment of *non pros.* (h).

(c) See *ante*, book ii. ch. iii. iv. v.; and see *St. Katherine's Dock Company v. Higge*, 10 Q. B. 652, n.

(d) *Marsh's case*, 1 Leon. 325, 326.

(e) 21 H.

(f) See the case reported in 14 Jur.

970 ; and the judgment of Wilde, C. J. in error, *Id.* 974.

(g) See 3 Bac. Abr. Error, K; Carth. 40 ; 2 Tidd's Pr. 8th ed. 1222.

(h) See 1 Chitty's Arch. Prac. 8th ed. 500.

CHAPTER IX.

OF SCIRE FACIAS TO REVIVE A JUDGMENT IN EJECTMENT.

<i>Judgment must be revived after a Year and a Day</i> , p. 215.	<i>On Death of Plaintiff</i> , p. 216.
<i>Necessary at Common Law</i> , p. 215.	<i>On Death of Defendant</i> , p. 217.
<i>When not necessary</i> , p. 216.	<i>Scire Facias for Costs</i> , p. 217.
<i>Necessary on Change of Parties</i> , p. 216.	<i>On Marriage of Feme Sole Defendant</i> , p. 217.
	<i>In other Cases</i> , p. 217.
	<i>Forms</i> , p. 217.

It has been already seen, that a judgment in ejectment, if not executed within a year and a day, is presumed to be satisfied, and that, like any other judgment, it requires to be revived by *scire facias* before a writ of possession can be executed (a). And even if a writ of *habere facias possessionem* be sued out, and not executed within the year, and it be not returned and filed, it becomes a nullity, and if another writ of *habere* be subsequently sued out, the Court will award a restitution *quare erroneè emanavit* (b). And this was necessary at common law in all real actions where land was recovered, for "the judgment being particular in the real action *quoad* the lands, with a certain description, the law required that the execution of that judgment should be entered upon the roll, that it might be seen whether execution was delivered of the same thing of which judgment was given. If, therefore, no execution appeared on the roll, a *scire facias* issued to show cause why execution should not lie" (c). Even if judgment were obtained against the casual ejector, and the merits of the case were not tried, after a year and a day without execution, a *scire facias* must issue to revive the judgment, and the terre-

Judgment must be revived after a year and a day.

Necessary at common law.

(a) See *ante*, book i. ch. ii. p. 23; Woodf. L. and T. 6th ed. 611, 876; Adams' Eject. 4th ed. 303; Chitty's Arch. Prac. 8th ed. 963; *Doe d. Stephens v. Lord*, 7 Ad. & E. 610.

(b) *Doe d. Stephens v. Lord*, 7 Ad. & E. 613; *per Denman, C. J., Goodtitle d. Murrell v. Badtill*, 9 Dowl. 1009;

and see 2 Tidd, 8th ed. 1154.

(c) See *ante*, book i. ch. i. p. 2; Bac. Abr. tit. Execution, H; and *Ibid.* tit. Scire Facias, C, 1; *Doe d. Ramsbottom and others v. Roe*, 2 Dowl. N. S. 690; *Runnington on Eject.* 2nd ed. 478; *Proctor v. Johnson*, 1 Ld. Raym. 670; 2 Inst. 469.

tenants must be joined in the writ (*d*). The omission to issue a *scire facias* is not an irregularity merely, but is an error in *materialibus*; and an application to set aside an execution for such an omission may be made by the tenant in possession, though he did not appear (*e*).

When not
necessary.

But as in other cases, a *scire facias* is not necessary where there is a stay of execution by consent of the parties for the year (*f*), nor where the defendant brings error and is afterwards nonsuited (*g*); nor where the party has taken out execution within the year, and, although it has not been acted upon, has continued it down until it is executed (*h*). It was at one time held, that where the delay beyond the year was occasioned by an injunction out of Chancery staying the execution, the judgment must be revived by *scire facias*, because an injunction was not a matter of record of which the common-law Courts could take notice (*i*). But in *Mitchell v. Cue et Uxor* (*k*) good sense determined that, being within the same reason, the same rule ought to prevail (*l*).

Necessary
on change of
parties.

We come now to the class of cases which more pertain to the subject of the present book, as to the necessity of a *scire facias* where there has been a change of parties.

On death of
plaintiff.

If the lessor of the plaintiff should die before the writ of possession on the judgment in ejectment has been issued, no *scire facias* on principle seems to be necessary, because the lessor of the plaintiff is no party to the record. And so it appears to have been held in *Doe d. Beyer v. Roe* (*m*), the plaintiff in the action being *John Doe*, the defendant cannot object that *John Doe* is dead, and that the writ of execution should not issue on his behalf (*n*).

But if the plaintiff, where he is a real person, should die within

(*d*) *Proctor v. Johnson*, 1 Ld. Raym. 669; *Doe d. Ramsbottom and others v. Roe*, 2 Dowl. N. S. 690.

(*e*) *Goodtitle d. Murrell v. Badtittle*, 9 Dowl. 1009; see *contra*, that the writ is not void, but only voidable, *Blanchenay v. Burt*, 4 Q. B. 707.

(*f*) See *ante*, book i. ch. i. p. 8.

(*g*) *Withers v. Harris*, 2 Ld. Raym. 806; 1 Salk. 258; 7 Mod. 50; 2 Selton's Pr. 204; *Booth v. Booth*, 6 Mod. 288; 1 Salk 322; Woodf. L. and T. 6th ed. 876; *Short v. Heath*, 2 Crompt. Pr. 225; Ad. Ej. 4th ed. 346.

(*h*) Woodf. L. and T. 6th ed. 876.

See *ante*, p. 9.

(*i*) *Winter v. Lightbound*, 1 Stra. 301; *Booth v. Booth*, 1 Salk. 322; 6 Mod. 288, S. C. .

(*k*) 2 Burr. 660; and see *ante*, p. 8.

(*l*) *Hiscocks v. Kemp*, 3 Ad. & E. 682.

(*m*) 4 Burr. 1970.

(*n*) And see Ad. Ej. 4th ed. 304; and it appears from the case of *Moore v. Goodright*, 2 Stra. 900, that if the death of the plaintiff in ejectment be assigned for error, it is a contempt for which the Court will grant an attachment. And see 2 Chitty's Arch. Prac. 8th ed. 963.

a year and a day, his executors cannot take out an execution without a *scire facias*; for they are not parties to the judgment. If, however, execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death, because the authority is from the Court and not from the party (o).

When there are several plaintiffs—real persons—or several defendants in an action of ejectment, and one of them dies, execution may be sued out by or against the survivors, upon suggestion of the death made upon the roll (p). But where there is but one defendant, and he dies, it has been questioned whether execution might be sued out without a *scire facias*. In personal actions doubtless it cannot, because a new person will be charged; but in ejectment the plaintiff ought to have execution only of the land recovered (q); but the safer course is to sue out a *scire facias* against the defendant's executors and the terretenant (r). And as a *scire facias*, when necessary for the land, must issue against the terretenant wherever he may be, it will be also necessary to sue out another *scire facias* for the costs against the personal representative, unless he be himself the terretenant (s).

On death of defendant.

Scire facias for costs.

When the judgment in ejectment is against a *feme sole*, who marries before execution, the plaintiff's lessor should sue out an *habere facias possessionem*, in the maiden name of the defendant, for the land, and then proceed by *scire facias* against the husband and wife for the costs (t).

On marriage of *feme sole* defendant.

In all cases where, by the death, bankruptcy, or marriage of either of the parties to the record, new parties become entitled to or charged by the judgment, a *scire facias* becomes necessary, as in other cases, to introduce the new parties to the record, to make the execution consistent with the judgment (u).

In other cases.

For forms of *scire facias* in ejectment, see references in Appendix (v).

(o) Run. Ej. 429; Woodf. L. and T. 6th ed. 876.

(p) *Withers v. Harris*, per Holt, C. J., 2 Ld. Raym. 808.

(q) *Ibid.*

(r) Ad. Ej. 4th ed. 303. In *Cook v. Cook*, 3 Lev. 100, where, after judgment in ejectment, the defendant died and the plaintiff sued out a *scire facias* against his executors, and a stranger who had entered to have execution of the judgment, the *scire facias* was demurred to; but judgment was given for the plaintiff, *per totam*

Curiam, without argument that the *scire facias* lay.

(s) *Doe d. Taggart v. Butcher*, 3 M. & S. 557; Ad. Ej. 4th ed. 303; Woodf. L. and T. 6th ed. 876.

(t) *Doe d. Taggart v. Butcher*, 3 M. & S. 557.

(u) Woodf. L. and T. 6th ed. 612; and see *ante*, book ii. ch. i.; and see the several chapters, *ante*, which treat on *scire facias* in case of death, bankruptcy, or marriage.

(v) And see Chitty's Forms, 445 and 446.

CHAPTER X.

OF SCIRE FACIAS AGAINST THE SHERIFF BY THE EXECUTION CREDITOR.

Scire Facias against the Sheriff to compel him to pay Debt levied to Execution Creditor, p. 218.

Scire Facias against Sheriff who has returned that he has seized Goods to the amount of the Debt

which were afterwards rescued, p. 218.

No Scire Facias against Sheriff where he returns that he has the Goods in his Hands for Want of Buyers, p. 219.

Scire facias against the sheriff to compel him to pay debt levied to execution creditor.

If a sheriff return to a writ of *fi. fa.*, that he has levied the debt under the writ and has the money ready; but retains it in his hands, a *scire facias* lies against him to have execution of it, and to compel him to pay it over to the execution creditor (a). For the sheriff's return on the writ of *fi. fa.* is parcel of the record, on which either an action of debt (b), or a *scire facias* will lie.

Scire facias against sheriff who has returned that he has seized goods to the amount of the debt, which were afterwards rescued.

So also if the sheriff return that he seized goods under a *fi. fa.* to a certain value, and sold part of them; but the rest remained unsold for want of buyers, and were afterwards rescued, a *scire facias* lies against him to have execution to the whole value returned; for as the return of the rescue is not a good return in law (c), and the sheriff has admitted that he seized goods to that value, he is answerable to the plaintiff for the whole amount seized (d), as he was bound to sell them at all events (e); and by the sheriff's seizure of goods to the value of the debt, the debtor is discharged of the judgment, and may plead the seizure in bar to an action of debt, or *scire facias* on the judgment (f).

(a) *Smith v. Livesay*, Hutt. 32; 2 Wms. Saund. 6th ed. 71 b, n.; *Sly v. Finch*, Cro. Jac. 514; Godb. 276; Chitty's Arch. Prac. 8th ed. 1023; Bac. Abr. tit. Scire Facias, B. So also, an action of debt will lie against the sheriff or his executors, for the same cause, *Perkinson v. Gifford and others*, Cro. Car. 539; *Speake v. Richards*, Hob. 288.

(b) *Mildmay v. Smith*, 2 Wms. Saund. 344, n. 2.

(c) *Ibid.* n. (b).

(d) 2 Wms. Saund. 71 b, note to *Underhill v. Devereux*; *Sly v. Finch*, Cro. Jac. 514.

(e) *Clerk v. Withers*, 2 Ld. Raym. 1075.

(f) *Clerk v. Withers*, 2 Ld. Raym. 1072; *S. C.*, 11 Mod. 34; *S. C.*, 1 Salk. 323; *S. C.*, 6 Mod. 292, 299; *Atkinson v. Atkinson*, Cro. Eliz. 391; *Mountney v. Andrews*, Cro. Eliz. 237, and authorities there quoted; *Wilbraham v. Snow*, 2 Wms. Saund. 6th ed. 47 a, n. 1.

Where, however, the sheriff returns merely that the goods remain in his hands for want of buyers, a *scire facias* does not lie (g), but either a *venditioni exponas*, under which he is bound to sell the goods, and have the money in court on the return day of it (h), or, where the sheriff has gone out of office after such a return, a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods (i).

No *scire facias* against sheriff where he returns that he has the goods in his hands for want of buyers.

See reference to a form of *scire facias* against the sheriff in the Appendix (j).

(g) Chitty's Arch. Prac. 8th ed. 78; Chitty's Arch. Prac. 8th ed. 596. 1023. But see Bro. Abr. tit. Exec. pl. 69.

(h) *Cameron v. Reynolds*, Cowp. 403; *Keightley v. Birch*, 3 Camp. 524. (j) *Rushton v. Hatfield*, 3 B. & Ald. 204; and see *Mildmay v. Smith*, 2 Wms. Saund. 336 a.

(i) *Chutterbuck v. Jones*, 15 East,

CHAPTER XI.

SCIRE FACIAS IN CASES OF OUTLAWRY TO RECOVER DEBTS DUE TO THE OUTLAW, AND ON PARDON OF THE OUTLAWRY TO WARN THE PLAINTIFF.

What it is, p. 220.

Formerly a more Serious Punishment than now, p. 221.

Consequences of Outlawry, p. 221.

When a Scire Facias is required, p. 222.

Forfeiture of Goods and Debts to the King, p. 222.

Duty of the Sheriff, p. 222.

Inquisition of Outlaw's Goods,

Debts, and Lands p. 223.

Money raised awarded to the Plaintiff on Petition, p. 223.

Scire Facias to the Debtor of the Outlaw to recover the Debt, p. 224.

Scire Facias by Outlaw on Pardon or Reversal of Outlawry to warn the Plaintiff to proceed if he will, p. 224.

The Form of the Writ, p. 225.

What it is. AN outlawry is a proceeding to compel a defendant in a civil suit to enter an appearance, that the action against him may be tried, and on an indictment for a criminal offence, to stand and take his trial (a).

Formerly a more serious punishment than now.

Formerly to be outlawed was a far more serious matter than now. According to Trye (b), "in the reign of King Alfred (and until a good while after the Conquest), to be outlawed for felony as my Lord Coke hath it in his First Inst. cap. Villenage, sect. 197, fol. 128 b, was very dangerous, for such persons might have been put to death by any man as well as a wolf, that hateful beast might, for *utlagatus et wariata capita gerunt lupina*. But then, saith he, no man could have been outlawed, but for felony; but you may see there how this inhumanity was altered and restrained in the reign of Edward III. And now our laws are made more tender of life, though it be of such great malefactors, that so they may be punished or discharged by the hand of the law only, which *nulli facit injuriam*. Afterwards in Bracton's time, and somewhat before, process of outlawry was ordained to lie in all actions that were *quare vi et armis*, which Bracton calls *delicta*, for there the

(a) A man shall be outlawed for his default, if he will not stand to the law; and therefore upon an indictment for treason or felony, if the defendant does not appear upon the second *capias*, he

shall be outlawed. Com. Dig. tit. Utlagary, B.

(b) Trye's Jus Filasarii, p. 72; and see Co. Litt. 128 b; 1 Tidd's Prac. 8th ed. p. 127.

King shall have a fine. But since, saith Coke, by divers statutes process of outlawry doth lie in account, debt, detinue, annuity, covenant, case, and in divers other common or civil actions." And according also to Lord Coke, in another place, an outlaw was *extra legem positus* (c).

But at the present day in civil actions outlawry is rather in the nature of a process to compel the defendant to submit to the jurisdiction of the Court; if outlawed upon mesne process, the defendant may upon entering an appearance, &c., reverse the outlawry as of course; if upon final process, he may reverse the outlawry upon payment of the debt and costs (d).

By outlawry in civil actions (e), a man is put out of the protection of the law, so that he is incapable of suing for the redress of injuries, and he may be imprisoned if he can be found (f). He is incapacitated from suing in his own right, or from seeking to enforce a legal right of his own, or from moving in Court for his own benefit, as that an attorney's bill of costs be taxed (g), or from serving on juries, or from appearing in Court for any other purpose than either to reverse his outlawry (h), or it seems to protect or defend himself from any wrongful action or proceeding, or "from the claims of others," by "seeking protection from the law" (i). It has been held that he may petition for his discharge in the Insolvent Court (j). By outlawry a man (k) forfeits all his goods and chattels, and the profits of his lands; his personal chattels immediately upon the outlawry, and his chattels real and the profits of his lands when found by inquisition (l). For a further exposition of the law relating to and of the consequences of outlawry generally, the reader is referred to the books of

(c) Co. Litt. 122 b; *Hamlin v. Crossley*, 8 Ad. & E. 680.

(d) Chitty's Arch. Prac. 8th ed. p. 1134.

(e) As to outlawry in a criminal case, see Bac. Abr. tit. Outlawry, D, 2.

(f) Tidd's Prac. 127, 8th ed.; Chitty's Arch. Prac. 8th ed. 1133.

(g) *Re Mander*, 6 Q. B. 867.

(h) *Aldridge v. Buller*, 2 M. & W. 413; per Lord Abinger, C. B.

(i) *Hawkins v. Hall*, 1 Beav. 73; *Byrne v. Manning*, 2 Dowl. N. S. 403; *Walker v. Theluson*, 1 Dowl. N. S. 578; *Re Pyne*, 5 C. B. 407; *Davies v. Trevanion*, 2 D. & L. 743.

(j) *Hamlin v. Crossley*, 8 Ad. & E. 677; 3 Nev. & P. 543.

(k) If the outlaw be a woman, the proceeding to outlawry is called a *waiver*; for as women were not sworn to the law by taking the oath of allegiance in the leet (as men anciently were, when of the age of twelve years or upwards) they could not properly be outlawed, or put out of the law, but were said to be *waived*, that is, *dere-licta*, left out, or not regarded. Litt. § 186; Co. Litt. 122 b.; Trye, 66; Tidd's Prac. 8th ed. 127.

(l) *Bretton v. Cole*, 1 Salk. 395; Tidd's Prac. 8th ed. 127.

When a
scire facias
is required.

practice (n). The object of the present chapter is to direct attention to those cases in which proceedings in outlawry render necessary the issuing of a writ of *scire facias*; which are, *first*, to recover the debts, and choses in action found by the sheriff's inquisition to be due to the outlaw, which then belong to the King, and which are usually granted on proper application to the plaintiff, who sued the outlaw; and, *secondly*, to give notice to the creditor of the outlaw of the reversal of the outlawry by statute, or by the Queen's pardon.

Forfeiture of
goods and
debts to the
King.

And 1st, as to *scire facias* to recover the outlaw's debts, and choses in action. One of the *immediate* consequences of outlawry as just stated, is that the outlaw forfeits *his debts and choses in action* as well as his personal goods, and they become vested in the King (o); and upon inquisition being afterwards taken by the sheriff, he also forfeits the profits of his lands and his chattels real (p).

Duty of the
sheriff.

When all the preliminary proceedings have been taken to warrant the issuing of a special (q) writ of *capias utlagatum*, the sheriff is commanded by the writ to take the defendant into custody (r); and also "to inquire by the oath of honest and lawful men of his county what goods and chattels, lands and tenements he hath or

(n) See Tidd's Prac. 8th ed. 124; Trye's Jus Ffazarii; Bac. Abr. tit. Outlawry; Com. Dig. tit. Utlagary; Chitty's Arch. Prac. 8th ed. 1132.

(o) "An outlawry is in the nature of a judgment for the king." Hardr. 22; Com. Dig. Utlagary, D 5.

(p) *Bretton v. Cole*, 1 Salk. 395; 1 Madd. Hist. of Exch. 347; Vin. Abr. tit. Scire Facias, D. "Scire facias lies upon offices found for the king;" and see *Bullock v. Dodds*, 2 B. & Ad. 258, as to the effect of attainder.

(q) After judgment of outlawry is obtained in the Court below and returned by the sheriff, and recorded above, execution could be taken out against the outlaw; which was either *general* to arrest the body, or *special* to arrest the body, extend the goods, lands, debts, and choses in action. And when the inquisition is taken, it is returned by the sheriff into the Common Pleas, and then a

transcript of the outlawry and inquisition is transmitted into the Exchequer; and thereupon, if any debts be returned due from any one to the outlaw, on application to the Exchequer, a *scire facias* issues to such person to show cause why the king should not have such sum found due on the inquisition to the outlaw." * * * * * The transcript of the record is sent into the Exchequer, that the Court of ordinary revenue may have it in charge; but the Court of Exchequer usually grants a *custodium* to such person as sued the outlawry." Gilbert's Hist. and Prac. of Civil Actions in the Court of Com. Pleas, 16.

(r) But now, when the *capias utlagatum* is founded upon a judgment in a civil action, it is held to be in the nature of a private execution, and the defendant has the same privilege from arrest as in other cases. *The case of the Sheriff of Kent*, 2 Car. & Kir. 197.

had on the day of his outlawry, or at any time afterwards; and by their oath to extend and appraise the same according to their true value; and to take them into the King's hands and safely keep them, so that he may answer to the King for the true value and issues of the same; making known what he shall do thereupon to the Court on the return day." Upon this writ the sheriff is to impanel a jury, who are to make inquiry of the goods and chattels of the defendant, including his *debts* or choses in action (*s*), and also of his leasehold and freehold lands and tenements; to appraise the goods, and to extend or value the lands, &c. (*t*). When this writ is returned with the inquisition annexed, and filed in the office of the *Custos breviarum*, a transcript is sent into the Exchequer, out of which Court there then issues, (if the defendant has not been arrested and has not appeared,) a *venditioni exponas* to sell the goods, a *scire facias* to recover the debts (*u*), and a *levari facias* to recover the issues and profits of the lands and tenements (*t*). The money thus raised belongs to the Crown; but the plaintiff may have it paid to him in satisfaction of his debt and costs, if it do not exceed 50*l.*, by applying by motion to the Court of Exchequer; or if it exceed that sum, by petitioning the Lords of the Treasury (*x*).

Inquisition of outlaw's goods, debts, and lands.

Money raised awarded to the plaintiff on petition.

(*s*) 4 Co. 95; Lane, 23; Lut. 329, 1513; Gilb. C. P. 200; 2 Roll. Abr. 806 *l.* 52.

(*t*) Tidd's Prac. 8th ed. 134; 2 Roll. Abr. 807 *l.* 32; Com. Dig. Utlagary, D, 2. The cattle of a stranger, levant and couchant, on lands extended upon an outlawry may be taken upon a *levari facias* for the king. Carth. R. 441; and see Hard. Rep. 422, as to an extent against leasehold lands of a debtor of an outlaw. But, "If a man bails goods to one in pledge, and afterwards he is *utlagatus*, the king shall not have these goods before the party be satisfied. So, if a lease be made to one for years, of goods, and he is afterwards *utlagatus*, a *scire facias* issues out for the king; he shall not have the goods till the lease be ended. 13 R. 2; 3 Bulst. 17.

(*u*) "If the king's debtor was unable to satisfy the king's debt out of his own chattels, the king would betake himself to any third person who was indebted to the king's debtor, and

would recover of such third person the debt he owed to the king's debtor, in order to get payment or satisfaction of the debt due to the Crown; and then, upon such recovery had, the third person was acquitted against the king's debtor, and the king's debtor was acquitted against the king, *de tanto*." Madd. Hist. and Antiquities of the Exchequer, vol. ii. 189.

(*x*) *Ibid.* 135; Chitty's Arch. Prac. 8th ed. 1141, 1142. In a personal action, the outlawry shall be for the benefit of the party if he please; and, therefore, if the defendant be taken upon a *capias utlagatum*, after judgment, upon prayer, he shall be in execution for the party. Com. Dig. tit. Utlagary, D, 4. The King may grant the benefit of an outlawry to another. 2 Roll. Abr. 188 *l.* 5. See *Garnon's case*, 5 Co. 88. In this case it was resolved, "that if any one at the common law have judgment in an action of debt, and after judgment outlaw the defend-

Scire facias to the debtor of the outlaw to recover the debt.

Upon the transmission into the Exchequer of the transcript of the outlawry and inquisition, if any debts be returned due from any one to the outlaw, on application to the Exchequer, a *scire facias* issues to such person to show cause why the King should not have such sum found due on the inquisition to the outlaw (*y*), to which, of course, the debtor to the outlaw has the opportunity of pleading any defence he may have, as in other cases (*z*).

Scire facias by outlaw, on pardon or reversal of outlawry to warn the plaintiff to proceed if he will.

Secondly, on reversal of the outlawry by statute, or by the Queen's pardon, a *scire facias* is required to be issued by the outlaw before he "quietly withdraws" from the Court, to warn his creditor, the plaintiff, of the reversal of the outlawry, that he may proceed further against him if he will (*a*). And it seems that the outlawry cannot be discharged until the outlaw has brought his *scire facias*, setting forth his pardon by statute or by charter from the Crown (*b*). And if the outlaw be possessed of lands, the

ant, then the plaintiff is at the end of the suit for any process to be sued in his name, yet if the defendant be taken by *utlary*, at the suit of the king, no laches being in the plaintiff, in continuance of his process, he shall be in execution for the plaintiff, if he will; for reason requireth, that if the king shall have benefit by the suit of the party, so the plaintiff shall have benefit by the suit of the king." And see *Leighton v. Garmons*, Cro. Eliz. 700.

(*y*) See *Grant v. Bryant*, 6 M. & S. 347; and Gilb. C. P. 16. The reason of returning the transcript of the record from the Common Pleas into the Exchequer is, for when the inquisition has returned the outlaw to be possessed of any goods or lands, he being out of the king's protection, cannot enjoy anything, and the profits of the lands are to be seized into the king's hands, whilst he continues outlawed: and, therefore, the transcript of the record is sent into the Exchequer, that the Court of ordinary revenue may have it in charge. But the Court of Exchequer usually grants a *custodium* to such person as sued the outlaw. *Ibid.* 17. And see Bac. Abr. tit. Outlawry, D, 4, 63. After the inquisition returned in C. B., a transcript thereof shall be

transmitted to the Exchequer, and, thereupon, a *scire facias* goes against him who has goods of the outlaw in his hands. See a precedent of the writ, in *Aldworth v. Hutchinson*, Com. Dig. tit. Utlagary, D, 5; 1 Lutw. 329. See, also, *Thesaurus Brev.* 228.

(*z*) See *Grant v. Bryant*, 6 M. & S., 347; and see *post*, book iii. ch. viii., "Scire Facias on Inquests of Office."

(*a*) Trye's *Jus Filazarii*, Precedent of Writ, 134, 135; 1 Tidd's *Prac.* 8th ed. 141; Bac. Abr. tit. Outlawry, G, 2, 89.

(*b*) *Ellis v. Typin*, Style, Rep. 348. The Court was moved, that an outlawry might be discharged, alleged to be pardoned by the Act of Oblivion, 12 Car. II. c. 11. But the Court held, that the outlawry cannot be discharged on an Act of Oblivion, until the party have brought his *scire facias* upon the Act; and it was also said, that the party at whose suit another is outlawed, hath an interest by the outlawry, as well as the state. Bac. Abr. Scire Facias, B. *Allen v. Powell*, 1 Sid. 231. *Fait move pur aver scire facias d'avoider judgment que fuit void per le stat. 12 Car. II., de general pardon ceo esteant ewe devant anno 1658, pur matters relateant al Guerra mes le*

tenure of which may be affected by his outlawry, a *scire facias* appears to be necessary to warn the terretenants, and the lords mediate and immediate, before the outlawry can be reversed (c). The return of *scire fecit* is, that the creditor makes default, and the debtor is allowed to go without day, and the pardon of the King, or of the statute, is allowed (d). It seems that the *scire facias* on such pardon cannot be allowed until the party who sues the pardon has appeared to the action of the plaintiff (e).

It seems that there are no further proceedings on this writ (f).

The writ recites the commencement of a suit against the outlaw by the plaintiff, and that because the defendant did not appear, he was put in the *exigent* to be outlawed, and was outlawed, as appears by record: and that the Queen being moved with pity pardoned him, or that an act was passed pardoning his outlawry (as the case may be). And because it is necessary and expedient, before the defendant quietly withdraws from the Court, that the plaintiff should be warned, the sheriff is commanded to make

The form of the writ.

Court si *scire facias*, gist on si le party doet aver audita querela, et pur ceo ils prent temps pur advise. *Allen v. Powell*, 1 Sid. 231.

(c) *Reg v. Stafford*, 10 Mod. 188; 2 Hawk. P. C. book ii. ch. 50, s. 14; *Bellingham's case*, 1 Dyer, 34 a; *Arthur's case*, 1 Ld. Raym. 154; *S. C.*, 2 Salk. 495; *Rex v. Young*, 12 Mod. 544; *Rex v. Armstrong*, 4 Mod. 366.

(d) Trye, *ubi supra*.

(e) See *Ratcliffe's case*, 2 Dyer, 172 a, and note 11; and 5 Edw. III. c. 12. The 5th Edw. III. c. 12, is as follows.—“Also it is accorded and established, that in case where the plaintiff shall recover damages, and he against whom the damages are recovered be outlawed at the King's suit, that no charter of pardon shall be granted of his outlawry, except the Chancellor be certified that the plaintiff is satisfied of his damages, and in case where a man is outlawed by process before his appearance, that no such charter shall be granted except the Chancellor be certified that such person outlawed hath yielded himself to prison, before the justices of the Court from whence

the writ of *exigent* issued; that is to say, if from the King's Bench, then he shall yield him in the same Court; and if from the Common Bench, then he shall yield himself there; and if from the justices of *oyer and terminer*, whiles the same justices do sit, he shall yield him before them; and if they be risen, then he shall yield him in the King's Bench before the justices, and the record with the process shall be removed before them by writ. And the said justices before whom they shall so yield them, shall cause the party, plaintiff, to be warned to appear before them at a certain day; at which day, if the warning be duly testified, if the plaintiff appear upon his warning, then they shall plead upon the first original writ, as though no outlawry had been pronounced; and if the plaintiff come not, he that is outlawed shall be delivered by virtue of his charter. And it is to be understood, that all such charters be of the grace of the King, as before they have been.”

(f) 2 Chitty's Arch. Prac. 8th ed. 1023.

known to the plaintiff to appear in Court, to further prosecute his suit against the defendant if he will (g).

If one of two defendants in a joint action should be outlawed, the action will not thereby become separate; and if the other defendant should die, the action will *survive* against the outlaw; and a *scire facias* will not lie against the representatives of the deceased defendant (h).

(g) For references to precedents of the writ, upon the pardon of an outlawry by the King, and also by statute, with the return thereto, see the Appendix.

(h) *Fort v. Oliver*, 1 M. & Sel. 242.

BOOK THE THIRD.

CHAPTER I.

OF THOSE CASES IN WHICH THE WRIT OF SCIRE FACIAS IS AN ORIGINAL ACTION OR IN THE NATURE OF AN ORIGINAL ACTION.

General Principle that a Party aggrieved cannot remedy his own Wrong without the Authority of a Court of Law, p. 227.

Scire Facias to repeal a Void Patent, p. 227.

An Original Writ, p. 228.

When it lies, p. 228.

In what Cases, p. 229.

Scire Facias to have Execution of a Forfeited Recognizance, p. 229.

Its Advantage over the Action of Debt, p. 230.

An Original Action, p. 231.

Exceptions, where not required, p. 232.

Recognizances at Common Law, p. 232.

Scire Facias for Debt of the Crown secured by Bond, p. 233.

Scire Facias to have Execution of Forfeitures to the Crown, p. 233.

It has been already briefly stated, that this writ, in some cases, is in the nature of an original action (a). It is proposed in the chapters of the present book to confine attention to those cases in which it is so.

It is a general principle of law, that a party, whether the King or a subject, cannot by his own act remedy any injustice, or recover any debt, or possession of any lands or chattels, by any writ of execution, without the leave and authority of a Court of law (b).

Thus, if the Crown, by deceptious *ex parte* statements, be induced to grant a patent for an invention (by which the patent is void), neither the Crown nor the public can infringe the patentee's right (c), until he has had an opportunity in a Court of law of disproving, if he can, the accusation of deceit; and until by the solemn adjudication of the Court the patent is for that cause de-

(a) See introductory chapter, p. 12.

E. 614; 3 Bla. Com. 259.

(b) To this rule there are some exceptions; in the case of the Crown, by the prerogative writ of extent; and in the case of a subject, in Statutes Merchant and Staple; see *ante*, p. 71. See *Doe d. Stevens v. Lord*, 7 Ad. &

(c) For an action will lie by the patentee for any infringement of his patent, notwithstanding such void patent. *Sir Oliver Butler's case*, 2 Vent. 344; S. C., 3 Lev. 221; Hindmarch on Patents, 384; Webster on Patents, 31, 32.

General principle that a party aggrieved cannot remedy his own wrong without the authority of a court of law.

Scire facias to repeal a void patent.

clared void. The action of *scire facias* is the remedy provided by the law, not only for the Crown on behalf of the public, but also for any of her Majesty's subjects who can show that a void or illegal patent operates to his prejudice (*d*).

An original writ.

It has been already seen that a *scire facias* to repeal letters patent is an original writ, founded on the record of the patent (*e*). And, according to Lord Coke (*f*), it lies before the Lord Chancellor, in the ordinary course of justice, in three cases: "The first, when the King, by his letters patents, doth grant by several letters patents, one and the selfsame thing to several persons, the former patentee shall have a *scire facias* to repeal the second patent (*g*). Secondly, when the King granteth anything that is grantable, upon a false suggestion, the King by his prerogative *jure regio*, may have a *scire facias* to repeal his own grant. Thirdly, when the King doth grant anything which by law he cannot grant, he, *jure regio* (for advancement of justice and right) may have a *scire facias* to repeal his own letters patents." And the judgment in all these three cases is, that the letters patent be revoked and cancelled, and be made null and void and invalid (*h*). And in *Sir Oliver Butler's case* (*i*), Lord Chancellor Finch, assisted by two of the judges, held that, "Where a patent is granted to the prejudice of the subject, the King of right is to permit him, upon his petition, to use his name for the repeal of it, in a *scire facias* at the King's suit, and to hinder multiplicity of actions on the case; for such action will lie notwithstanding such void patent." The judgment in the suit is, that the letters patent be recalled back into the same place from whence they went forth,

(*d*) Hindmarch on the Law of Patents, 384.

(*e*) *Ante*, introductory chapter, p. 12; 1 Stra. 161; *Rex v. Eyre*, 1 Stra. 43; *Rex v. Sir Oliver Butler*, 3 Lev. 223; Bac. Abr. tit. *Scire Facias*, C, 138; Hindmarch on Patents, 379.

(*f*) 4 Inst. 88. "The patent is a record in Chancery, on which the *scire facias* issues." *Sir Oliver Butler's case*, *supra*.

(*g*) And see *Pennwarren v. Thomas*, Dy. 198 a.

(*h*) And see *ante*, introductory chapter, p. 12; Bac. Abr. tit. *Scire Facias*, C, 3; Hindmarch on Patents, 384. Almost immediately after the establishment of the Court of King's Bench for

criminal law, the Common Pleas for civil suits, and the Exchequer for the revenue, all extraordinary cases of a judicial nature being reserved for the King in Council, the Chancellor held a separate independent Court, in which the validity of Royal Grants was questioned by *scire facias* to guide the decision of the *Aula Regia*, in which Court the Chief Justiciary presided, and in which all causes of importance, of whatever description, were decided. (Lord Campbell's Lives of Lord Chancellors, vol. i. pp. 5 and 6.)

(*i*) 2 Vent. 344; *S. C.*, 3 Lev. 229, 221; and see *Brewster v. Weld*, 6 Mod. 229.

under the great seal, that they may be cancelled: that is, that the great seal may be taken off (*k*).

In the same manner the writ lies for the repeal of a charter granted to a corporation, where the complaint is that the Chancellor has wrongfully put his seal to it; and if the charter be granted under the seal of a county palatine, it lies in that Court where the seal is kept (*l*); and it lies for the repeal of letters patent granting a franchise, as a fair (*m*), a market (*n*), a rectory (*o*), a ferry (*p*), a toll (*q*), an office, where the officer neglects his duty (*r*), &c.; in all which cases, although there has been a forfeiture of the franchise, yet the grant of the franchise is not cancelled, nor can an officer holding an office of record (as a serjeant-at-arms), be removed even by the Queen, on account of the forfeiture, without a *scire facias* (*s*).

In what cases.

So, when a party seeks to have execution of a forfeited recognizance, the condition of which is not on the face of it broken, but which requires proof to show it to be broken, as that some third party shall do a certain act, or that he will be of good behaviour (*t*), or the consor will forfeit the amount of his recognizance, a writ of *scire facias* must be issued (or an action of

Scire facias to have execution of a forfeited recognizance.

(*k*) *Rex v. Hare and another*, 1 Stra. 151.

(*l*) *The Mayor and Burgesses of Liverpool v. The Chancellor of the County Palatine of Lancaster*, cited in *Rex v. Hare and another*, 1 Stra. 151; Bac. Abr. tit. *Scire Facias*, C, 3.

(*m*) *Reg v. Aires*, 10 Mod. 258.

(*n*) *Rex v. Eyre*, 1 Stra. 43; *Sir Oliver Butler's case*, 3 Lev. 220; 11 H. IV. 5; *Basset v. Corporation of Torrington*, Dy. 276 a.

(*o*) *Brewster v. Weld*, 6 Mod. 230.

(*p*) *Peter v. Kendal*, 6 B. & C. 710.

(*q*) 2 Edw. III. 34.

(*r*) *Rex v. Eston*, Dy. 198 a.

(*s*) *Sir Oliver Butler's case*, 2 Vent. 344; S. C., 3 Lev. 220; *Pemwarren v. Thomas*, Dy. 198 a; and see introductory chapter, p. 12.

(*t*) *The Queen v. The Justices of the West Riding of Yorkshire*, 7 Ad. & E. 593; per Lord Denman, C. J., "No rule is more invariable than that a per-

son shall not be prejudiced in any manner without being heard." * * *

"The conviction may have been wrong; possibly indeed, though bearing the same name he may not be the same person; he may therefore have had cause to show against the forfeiture of his recognizance, which he has had no opportunity of doing. We were referred to the authorities collected in Bason's Abridgment, under the title *Scire Facias*, C, 2; and we shall advert to one of them. "If a man be bound in a recognizance to the King upon condition to be of good behaviour, &c., he cannot be indicted for breach of the good behaviour by which he forfeits his recognizance, without a *scire facias*; and a weighty reason is given; for if a *scire facias* had been brought, he might have pleaded some matter in discharge thereof." And in the case of *Rex v. Hutchings*, Cro. Jac. 412, which is there referred to, which was

debt be brought), to warn the conusor to plead any defence that he may have, why execution should not go against him on his forfeited recognizance (u). This rule is calculated to prevent injustice, as it gives to the conusor or defendant an opportunity of averting execution on the recognizance, if it be not forfeited, by pleading that the condition has not been forfeited (x), or that it has been performed (x), a release of all actions (y), payment, or even to question the very foundation of the claim, by a denial of any such record existing; and the facts will then be decided on by a jury. If judgment be given against the conusor or defendant, it is entered on the record, and the production of the judgment paper or *postea*, is then an authority to the proper officer to seal a writ of execution for the plaintiff (z).

Its advantage over the action of debt.

The advantage of proceeding by *scire facias* in preference to bringing an action of debt on a forfeited recognizance, the condition of which it is necessary to prove to have been broken, is set forth in the case of *Paine v. Puttenham* (a), in which case the effect of a judgment in each mode of proceeding is described. "If an action of debt be brought at common law against the conusor, and the count be upon a recognizance and failure of payment at the day, &c., by which an action accrued to the plaintiff, &c., there, the defendant being condemned, a *ca. sa.* lies, and his body shall be in execution, for there the plaintiff waives the *speedy remedy, scilicet* the *feri* or *scire facias* which is founded on the record, and hath elected the other remedy, &c., and he shall not have execution of lands and tenements which the conusor hath on the day of the recognizance made, as he might have on *scire facias*; but of lands and tenements which he hath on the day of the judgment given upon the action of debt." In an

a recognizance for good behaviour taken in the Crown office, it appears that a writ of *scire facias* was brought. And upon inquiry, we find that the course of proceeding in the Crown office is, uniformly, in conformity hereto."

(u) See note (f), p. 229.

(x) Bac. Abr. tit. Execution, B. "If upon a *scire facias* on a recognizance at common law, the conusor is returned summoned, he shall never avoid it by *audita querela*, because the recognizance was upon condition which he

hath performed; for by the summons he had a day in Court given him to plead the performance of the condition, which would have been sufficient to stop the execution."

(y) Com. Dig. tit. Pleader, 2 W. 34. "To debt upon a statute or recognizance, the defendant may plead a release."

(z) Reg. Gen. H. T. 2 Will. IV. r. 75; 1 Dowl. 193; Reg. Gen. K. B. H. T.; 2 & 3 Geo. IV.; 5 B. & Ald. 560; *Finch v. Brook*, 5 Dowl. 61.

(a) 3 Dy. 306 a.

action of debt, the plaintiff has execution of the defendant's lands and tenements at the time of the judgment given in the action (*b*), with a *ca. sa.* if need be against the body of the defendant. In a writ of *scire facias*, the remedy is more speedy; and a recognizance enrolled being of the same effect as a judgment (*c*), it binds the lands and tenements (*d*) of the conusor from the time of its enrolment (*e*); but whether or no a *ca. sa.* against the conusor's body can be issued, depends upon the form of the recognizance (*f*).

The *scire facias* to have execution of a recognizance, is a judicial writ founded upon it, (the recognizance being a record,) and issuing out of the Court where the record is; and it is in the nature of an original action to have execution of a debt of record (*g*); and the recognizance being a record, (except it contain a condition which must be shown to be broken) (*h*), is conclusive against the conusor, even if he have paid the debt to the conusee and have the conusee's acknowledgment (*i*), unless it be avoided by an instrument of as high a nature, namely by a judgment recorded on a *scire facias*, or in an action of debt on the recognizance, or on a writ of

An original action.

(*b*) Co. Litt. 102. a. "A judgment in a personal action binds the lands from the day of the judgment given."

(*c*) Chief Baron Gilbert's Treatise of the Exchequer, 96. "Where an obligation is acknowledged in a Court of record, such recognizance is the same as a judgment. The conusor is personally present, and the Court is supposed to know him as much as a defendant against whom they give judgment." And see *Attorney-General v. Sewell*, 4 M. & W. 89; S. C. 6 Dowl. 673.

(*d*) Goods and chattels are only bound from the delivery of the writ of execution to the sheriff. 2 Tidd's Prac. 8th ed. 1101; Com. Dig. Exec. C, 4; *Hutchinson v. Johnson*, 1 T. R. 731. And the property of the defendant in them is not changed before seizure. *Payne v. Drew*, 4 East, 522; before which the defendant may sell them in market overt, and the sale will be valid. *Samuel v. Duke*, 3 M. & W. 622; S. C. 6 Dowl. 536. In cases of Bankruptcy,

see *Whitmore v. Robertson*, 8 M. & W. 463; *Skey v. Carter*, 2 Dowl. N. S. 832.

(*e*) By stat. 29 Car. II. c. 3, 2 Bla. Com. 341, "A recognizance being either certified to, or taken by the officer of some Court, is witnessed only by the record of that Court, and not by the party's seal; so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the conusor from the time of enrolment on record."

(*f*) See *Paine v. Puttenham*, 3 Dy. 306 a.

(*g*) 2 Tidd's Prac. 8th ed. 1145; 2 Wms. Saund. 6th ed. 71 b. "A *scire facias* upon a recognizance is always an original proceeding."

(*h*) *Ante*, p. 229.

(*i*) *Attorney-General v. Sewell*, 4 M. & W. 89; *Brunkhorne's case*, Cro. Eliz. 233.

audita querela, showing the debt to have been satisfied or released; or by an entry of satisfaction on the record itself, which is the proper course to take in such a case (*k*).

Exceptions,
where not
required.

It has been noticed (*l*), that there are some species of recognizances which do not require any *scire facias* in order to have execution of them.

These cases have been treated at large in the seventh chapter of the first book, on exceptions to the ordinary rules requiring a *scire facias* to issue before execution. Briefly, they are recognizances founded on a statute merchant, or on a statute staple, or recognizances in the nature of a statute staple under the 23rd of Hen. VIII. c. 6 (*m*). These statutes made for the security and benefit of merchants and traders, and to encourage commerce, give a right of immediate execution on the recognizances being forfeited. In form, almost necessarily, these recognizances are given to secure the payment of a sum of money by the conusor at a certain day, which he acknowledges to owe. If the day be past and satisfaction be not entered on the record, on the face of it the recognizance is forfeited, and in ordinary cases no injustice can be done to the conusor by issuing immediate execution upon it. Should, however, the money have been paid, and by unfair dealing, without any acknowledgment having been placed on the record, and execution be issued upon the recognizance, the conusor must then resort to his remedy by *audita querela*, or motion in Court on affidavits, when he can show these facts, and will be relieved according to the justice of the case.

Recogni-
zances at
common
law.

And so also of recognizances at common law, entered into before a judge or before some magistrate duly authorized, so far as they are agreements by a party to pay a sum of money on a certain day; it seems that when taken before a judge, on being duly certified to be forfeited, (with the commission or authority for taking them) into chancery, the Chancellor may award execution thereon without any mesne process (*n*); or when taken before any justice or justices of the peace at petty or quarter sessions, and they are such as can be estreated at sessions, on being certified by the justices, by or before whom they are forfeited, to the clerk of the peace, they may by the stat. 3 Geo. IV. c. 46, s. 2, be entered

(*k*) *Ordway v. Parrett and another*,
Cro. Eliz. 132.

(*l*) *Ante*, p. 227, n. (*b*).

(*m*) See these exceptions fully stated,

ante, book i. ch. vii. p. 71 *et seq.*

(*n*) 2 Tidd's Prac. 8th ed. 1131;
Bac. Abr. tit. Execution, B.

on a roll and sent to the sheriff with the necessary writs, and the roll shall be the sheriff's authority for levying immediately the sum marked thereon (*o*). In these cases, as in recognizances by statute if the conusor be grieved by the immediate execution, he has his remedy by *audita querela* or motion; but it would seem that in all such cases where there is any doubt as to the forfeiture, as where the conviction may have been wrong, where he may not be the person though bearing the same name, &c., or where the conusor may have any cause to show against the forfeiture, a *scire facias* ought to and must issue (*p*).

In the same manner where the Crown seeks to recover a debt secured by bond, which by statute is made of equal force and effect with a recognizance, and where the debt may have been satisfied, a *scire facias* ought to issue before a writ of execution be sealed. It is then the obligor's own fault if the execution improperly issue. This case, however, falls within the excepted cases, as the Queen may, if so advised, by her prerogative proceed at once by writ of extent, to levy her debt by distress (*q*), for "the speedy levy and soonest satisfaction of the Queen's debt," upon an affidavit that the bond is forfeited, and that the debt is in danger (*r*).

Scire facias
for debt of
the Crown
secured by
bond.

So a *scire facias* is required in all cases before execution can be had of any forfeiture to the Crown, where lands or chattels have been found, by *Inquest of Office*, to belong to one who has incurred a forfeiture, and that inquisition has been recorded, showing the Crown to be entitled to them (*s*). The occupier of the lands, or the defendant is entitled to traverse the title of the Crown found by the inquisition (*t*), and, on issue being joined, the cause may be tried either at *bar* or *nisi prius* (*u*); and should the defendant succeed on the issue, the judgment is that the Queen's hands be removed (*x*). But if the Crown take possession of the lands

Scire facias
to have exe-
cution of
forfeitures
to the
Crown.

(*o*) 3 Burn's Just. 29th ed. tit. Fines and Forfeitures, 32; and see *Reg. v. The Justices of the West Riding of Yorkshire*, 7 Ad. & Ell. 590.

(*p*) *Per* Lord Denman in *Reg. v. The Justices of the West Riding of York*, 7 Ad. & Ell. 592.

(*q*) *Attorney-General v. Sewell*, 4 M. & W. 77; S. C. 6 Dowl. 673.

(*r*) 2 Tidd's Prac. 8th ed. 1092-3; 3 Bla. Com. 420; *Attorney-General v. Sewell*, 4 M. & W. 77; and see *ante*,

book i. ch. vii. p. 94.

(*s*) 2 Tidd's Prac. 8th ed. 1122.

(*t*) *Ib.* 1123.

(*u*) *Ib.* 1128; Cro. Car. 348-9.

(*x*) 2 Tidd, 1129; and see Bac. Abr. tit. Prerogative, E. "In all cases where a common person is put to his action, there upon an office found, the King is put to his *scire facias*; for an office entitles the King to an action only, and not to an entry; but where a common person may enter or seize, there an

under the *Inquest of Office* without *scire facias*, then, if the subject be grieved, his remedy is by the writ of *monstrans de droit* (y).

Each of these subjects will be treated in detail in the following chapters of this book.

office without a *scire facias* shall suffice
for the King;" and see 3 Bla. Com.
259; *Doe d. Hayne v. Redfern*, 12

East, 96.

(y) 2 Tidd's Prac. 8th ed. 1123.

CHAPTER II.

SCIRE FACIAS TO REPEAL LETTERS PATENT.

- Letters Patent, what they are, p. 236.*
- Grants from the Crown of Public Record, p. 237.*
- Letters Patent recorded on the Common-Law Side of the Court of Chancery, p. 237.*
- The Lord Chancellor makes the Letters Patent by affixing the Chancery Common-Law Seal, p. 237.*
- The Original Letters Patent delivered to the Patentee as his Evidence of Title, p. 237.*
- The Right to grant Letters Patent a Prerogative of the Queen derived from the Common Law, p. 238.*
- Are granted or refused on the Report of the Attorney-General, p. 238.*
- The Privilege granted, p. 238.*
- Exercise of the Prerogative restrained by the Statute of Monopolies, p. 238.*
- Effect of Letters Patent, p. 239.*
- Why granted, p. 239.*
- For what granted, p. 239.*
- Cannot be granted for a mere Abstract Principle, p. 241.*
- Title of Letters Patent, p. 241.*
- Enrolment of the Specification of the Patent, p. 241.*
- Grounds on which Letters Patent are Void, p. 242.*
- Entry of Disclaimer, p. 242.*
- Effect of a Voidable Patent, p. 243.*
- Right to sue for Infringement until Patent cancelled, p. 243.*
- Of Injunction to restrain further Infringements, p. 244.*
- Assignment of Patent, p. 244.*
- Extension of Term of Patent, p. 244.*
- How made Void, p. 244.*
- Construction of Grants from Crown, p. 244.*
- Scire Facias by the Queen to repeal her Grant, p. 245.*
- Scire Facias by a Subject to repeal Letters Patent, p. 246.*
- When same Grant made to Two Persons, p. 246.*
- Scire Facias to repeal Letters Patent an Original Writ, p. 247.*
- Writ formerly prepared by Clerk of Petty Bag Office, p. 247.*
- Solicitors now entitled to practice as Attorneys in the Petty Bag Office, p. 248.*
- Sealing of the Writ, pp. 248, 252.*
- Fiat of Attorney-General to issue Writ, p. 249.*
- Indorsement on Writ of Name of Superior Court, p. 249.*
- Action in the Name of the Queen, p. 249.*
- Bond of Indemnity against Costs, pp. 250, 276.*
- Form of Writ, p. 250.*
- When may be issued, p. 251.*
- The Person to be made Defendant, p. 251.*
- The Chancery Common-Law Seal, p. 252.*

Seal of the Enrolment Office in Chancery, p. 253.
Fees, p. 253.
Writ may be directed to the Sheriff of any County, p. 254.
Where returnable, p. 254.
When returnable, p. 254.
When tested, p. 255.
Summons to Defendant, p. 256.
Return to the Writ, p. 256.
Notice to the Defendant, p. 256.
Rule to the Defendant to answer the Writ, p. 256.
Judgment by Default, p. 256.
Appearance, p. 256.
Delivery of Declaration, p. 257.
When Declaration may be delivered, p. 257.
Form of Declaration, p. 258.
Authority of the Judges of the Superior Courts to determine Incidental Applications, p. 258.
Time to plead, p. 259.
Further Time to plead, p. 259.
Defendant must plead or demur to all the Suggestions, p. 259.
Or plead in Abatement, p. 260.
Cannot plead Double, p. 260.
Pleas must be delivered not filed, p. 261.
Issue, p. 262.
The Record, p. 262.
Issue may be tried in any of the Superior Courts, p. 262.

Notice of Trial, p. 264.
Delivery of Transcript of the Chancery Record, p. 264.
Power of the Superior Courts to try the Issues, p. 265.
May be tried either at Bar or at Nisi Prius, p. 265.
Trial by Proviso, p. 266.
The Nisi Prius Record, p. 266.
Venue, p. 266.
Practice, p. 266.
Trial by Special Jury, p. 267.
Praying a Tales, p. 268.
Proclamation at Trial, p. 269.
Demurrer to Evidence, p. 269.
Bill of Exceptions, p. 269.
Verdict, p. 270.
Venire de novo, p. 271.
New Trial, p. 271.
Return of the Transcript of the Record into Chancery, p. 271.
The Judgment to cancel the Letters Patent, p. 271.
Motion in Arrest of Judgment, p. 273.
Restoration of the Letters Patent into Chancery, p. 274.
Entry of Vacatur on the Roll, p. 275.
Writ of Error, p. 275.
Costs, p. 276.
Revocation of Grant, p. 277.
Proceedings do not abate by Demise of the Crown, p. 277.

Letters patent, what they are.

LETTERS patent are open grants of record, under the great seal, containing a grant of some franchise, honour, or liberty by the Crown to a subject, as of corporate rights, a manor, a fair, a market, a separate Quarter Sessions (a), a rectory, a ferry, a toll, an office, &c. (b), or of some privilege to an inventor or importer of some new and useful invention, art, or manufacture (c). Let-

(a) *Reg. v. Boucher*, 3 Q. B. 657.

(b) 2 Bla. Com. 346; Web. on Pat. 1; Bac. Abr. Prerogative, F. 1; and see *ante*, book iii. ch. i. p. 229.

(c) Hind. on Pat. 37; Stat. of Monopolies, 21 Jac. I. c. 3; Com. Dig. Pat. (D.)

ters patent, that is, open letters, *literæ patentæ*, are "so called because they are not sealed up, but exposed to open view, with the great seal pendent at the bottom, and are usually directed, or addressed by the Queen to all her subjects at large" (*d*).

All grants from the Crown are matters of public record (*e*), as being the deeds of the first magistrate, and are next in dignity to the acts of the state (*f*). A record in our law is defined to be a memorial of an act or proceeding of a Court of record, proceeding according to the course of the common law, entered on parchment for the preservation of it (*g*); and is of so high a nature that no averment can be taken against it (*h*).

Grants from the Crown matters of public record.

The Lord Chancellor is the sole judge of the common-law branch of the Court of Chancery (assisted, in cases of weight or difficulty, by some of the judges of the realm), in which all the Queen's letters patent are made and recorded (*i*). The making of letters patent by the Lord Chancellor, (by affixing the great seal to them, or, since the 11 & 12 Vict. c. 94, s. 13, re-enacted by 12 & 13 Vict. c. 109, s. 14,) by affixing the Chancery common-law seal to them, is an act of the Court of Chancery, by which the Court makes a record of the Queen's grant, that is, makes her letters patent containing her grant, in pursuance of her command (*k*).

Letters patent recorded on the common-law side of the Court of Chancery.

The Lord Chancellor makes the letters patent by affixing the Chancery common-law seal to them.

The original letters patent are always delivered out of Chancery to the patentee, as his evidence of his title to the grant which they contain, and therefore they are enrolled, that is, the grants which they contain are entered upon rolls in the Petty Bag Office, called the Patent Rolls, in order that the records of the Court of Chancery may at all times show what patents the Lord Chancellor has made in pursuance of the Queen's writs (*l*). These rolls are themselves records, to which all persons may have

The original letters patent delivered to the patentee as his evidence of title, and are enrolled.

(*d*) 2 Bla. Com. 346; Hind. on Pat. 37; Gods. on Pat. 2nd ed. 22.

(*e*) Dr. and Student, B. 1, d. 8.

(*f*) Gods. on Pat. 22; Com. Dig. Pat. A. "The Queen cannot grant or take anything but by matter of record." Co. 3 Inst. 71; "It is called a record, for that it recordeth or beareth witness of the truth, and is derived of the verb *recorder*, whereof the poet speaketh, '*Si rite audita recorder*.' It hath this sovereign privilege, that it is proved by no other, but by it-

selfe."

(*g*) Com. Dig. tit. Record, A; Co. Litt. 117. b.

(*h*) Com. Dig. tit. Record, E; Co. Litt. 260. a.

(*i*) 4 Inst. 79, 80, 84; 1 Shep. Abr. 464; and see *ante*, p. 228, n. (*h*); but see now 12 & 13 Vict. c. 109, s. 34, and *post*.

(*k*) Hind. on Pat. 37.

(*l*) 3 Shep. Abr. 93; Com. Dig. Pat. E.

access (m), and every one is bound to take notice of the grant so enrolled (n).

The right to grant letters patent a prerogative of the Queen derived from the common law,

and is granted or refused on the report of the Attorney or Solicitor-General. The privilege granted.

Exercise of the prerogative restrained by the Statute of Monopolies.

The right to grant letters patent is a prerogative of the Crown, derived from the common law, and not from any statute (o); and is vested in the Crown as the depository of the supreme executive power of the state, to be exercised on behalf of and for the benefit of the public (p). The exercise of this prerogative, like every other, is discretionary (q). On petition to the Queen, stating therein particularly the grant prayed for, and the grounds on which the favour of the Crown is asked, verified by solemn declaration before a Master in Chancery (r), her Majesty's Secretary of State refers the petition to the Attorney or Solicitor General, and on his report as to the propriety or not of granting the privilege sought for, it is granted or refused: if granted, the Lord Chancellor is authorized by writ under the privy seal, to make the patent (s), granting to the petitioner the liberty or franchise sought, or, (as the case may be,) for a certain term the monopoly of, or the sole right to "make, use, exercise, and vend" (t) any invention, art, or manufacture. This prerogative of the Crown, so far as it related to monopolies, not having been confined to inventions, arts, and manufactures newly invented, but having, in the sixteenth and seventeenth centuries, been very grossly abused, in granting monopolies of trades to individuals, a declaratory statute was passed in the twenty-first year of the reign of James I. (u), restraining the Crown from granting any monopolies "for the sole buying, selling, making, working, or using of any thing within the realm;" but, by the sixth section, excepting "letters patents, and grants of privilege for the term of fourteen years or under, thereafter to be made, of the sole working or making of any manner of *new manufactures* within the realm, to the *true and first inventor* and inventors of such manufactures, *which others at the time of making such letters patents, and grants shall not use*; so as also they be not *contrary to the law, nor mischievous to the state*, by raising prices of commodities at home, or hurt of trade, or *generally inconvenient*; the said fourteen years to be accounted from the date of the first letters patents or grants of such privilege hereafter to be made; and that the same shall be

(m) 1 Co. R. 45. a.; 3 Inst. 71.

(n) 1 Co. R. 45. a.; Hind. on Pat. 45.

(o) Hind. on Pat. 7, 17; Web. on Pat. 2.

(p) *Harmer v. Playne*, 14 Ves. 132; Bac. Abr. tit. Prerogative.

(q) Hind. on Pat. 17.

(r) *Ib.* 41.

(s) *Ib.* 17.

(t) Web. on Pat. 45, n. (d).

(u) 21 Jac. I. c. 3; A.D. 1623.

of such force as they should be if this Act had never been made, and of none other;" restraining in effect this prerogative of the Crown within its ancient common-law boundaries (*x*), with the importation of a new term, "new manufactures," which has been the foundation of most of the decisions since that act, as embodying in it most of the common-law rules (*y*); and also restraining the grant to fourteen years (*z*).

The operation of a grant of letters patent to any inventor or importer of any new and useful invention, art, or manufacture, is to give to the patentee and to those claiming under him, the sole and separate right, to the exclusion of all other persons, of "making, using, exercising, and vending" the invention, art, or manufacture mentioned in the patent, during the continuance of its term (*a*). Effect of letters patent.

This privilege is granted by the Crown to the inventor or importer of a new and useful invention, art, or manufacture, "in consideration of the good that he doth bring by his invention to the commonwealth" (*b*): and therefore, says Sir Edward Coke, "it is reason that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time" (*c*). Why granted.

And as has already been briefly stated, this privilege is grantable at common law (*d*) of "lands, honours, liberties, and franchises" (*e*), and also (for what is more important as regards the object of this chapter, as the writ of *scire facias* is far more frequently required for its repeal) for "a new trade," or "any engine tending to the furtherance of a trade that never was used before" (*f*), for "a new invention, or a new trade, brought in within the kingdom," or "a For what granted.

(*x*) See Hind. on Pat. 5 & 7, and Web. on Pat. 7.

(*y*) Hind. on Pat. 9, 81, 83.

(*z*) See stat. *supra*, and *Mitchell v. Reynolds*, 1 P. Wms. 181; 10 Mod. 130, S. C.

(*a*) Hind. on Pat. 60, 92; Web. on Pat. 45, n. (*d*).

(*b*) *Darcy v. Allen*, Noy, R. 182; "Where any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before; and that for the good of

the realm; in such cases the King may grant to him a monopoly patent for some reasonable time until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth; otherwise not."

(*c*) 3 Inst. 184; Web. on Pat. 3.

(*d*) Hind. on Pat. 83.

(*e*) See *ante*, p. 236; 2 Bla.Com.346.

(*f*) *The Case of Monopolies*, Noy, R. 182; *Darcy v. Allen*, F. Moore, 672; *Edgeberry v. Stephens*, 2 Salk. 446; 2 H. Bla. 463; Web. on Pat. 49, notes.

new discovery of anything" (*g*), for "a new device or any new engine tending to the furtherance of it," to "the first inventor" or "importer" (*h*) for any art invented or first brought into the realm by the grantee (*i*); for "as to new invented arts nobody can be said to have a right to that which was not in being before;" and therefore the grant of their monopoly for a reasonable time to the first inventor or importer "is but a reasonable reward to ingenuity and uncommon industry" (*k*); and such grants are good (*k*), "for the public has an advantage in the invention of an useful trade which after a limited time is to be public" (*k*). And since the Statute of Monopolies (*l*) it has been held that the term "any manner of new manufactures" extends to any "new process" (*m*), "mode" (*n*), or "method" (*o*) of manufacture, invented or imported from without the realm (*p*); but a patent cannot be

(*g*) *The Clothworkers of Ipswich case*, Godb. 252, 254; *S. C.* 1 Rol. R. 4; "If a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, in consumption of his estate, or stock, &c., or if a man hath made a new discovery of anything; in such cases the King, of his grace and favour, in recompense of his costs and travail, may grant by charter unto him that he only should use such a trade or traffic for a certain time; because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it; but when that patent is expired, the King cannot make a new grant thereof, for when the trade is become common, and others have been bound apprentices in the same trade, there is no reason that such should be forbidden to use it."

(*h*) *Shep. Abr.* part 3, tit. Prerogative, 61; *Edgiberry v. Stephens*, 2 Salk. 447.

(*i*) *Hawk. P. C.* book i. ch. xxix.; see 20; *Bac. Abr.* tit. Monopolies; *Id.* tit. Prerogative, F. 4.

(*k*) *Mitchell v. Reynolds*, 1 P. Wms. 181; *S. C.* 10 Mod. 130; *Morgan v. Seaward*, 2 M. & W. 544; "A grant of a monopoly for an invention which is altogether useless, may well be con-

sidered as 'mischievous to the state, to the hurt of trade, or generally inconvenient,' within the meaning of the stat. of Jac. I." *per Parke, B.*

(*l*) 21 Jac. I. c. 3.

(*m*) *The King v. Wheeler*, 2 B. & Ald. 345; "The word 'manufacture' might perhaps extend to a new process to be carried on by known implements, or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind," *per Abbott, C. J.*; *Hall v. Jarvis*, 1 Webs. R. 100.

(*n*) *Morgan v. Seaward*, 2 M. & W. 544.

(*o*) *Hill v. Thompson*, 3 Mer. 626; 1 Webs. R. 237; *Hind. on Pat.* 85; and see *Crane v. Price*, 4 M. & Gr. 580, in which case it was held that the invention of combining together two processes of smelting iron, both before separately known—the hot-air blast, and the use of stone-coal—was an invention within the meaning of the statute, and might well become the subject of a patent privilege.

(*p*) *Hind. on Pat.* 28, 30, 31; *Gods. on Pat.* 32.

granted for a mere abstract "principle," as some mode of employing practically the inventor's art and skill is requisite to satisfy the word "manufactures" in the Statute of Monopolies (*q*); and because "the elements of every science are common property—data—upon which every man may exercise his ingenuity, or otherwise the means of making improvements would be entirely destroyed" (*r*).

Cannot be granted for a mere abstract principle.

Letters patent for the sole right to "make, use, exercise, and vend" any article give no further explanation of the invention comprised in the grant, than is contained in the "title of the invention" mentioned in the recital of the patentee's petition for the patent (*s*). Since the reign of Queen Anne, however, it has been the practice by a proviso in the patent, making it void if not complied with, to require a particular description in writing of the nature of the invention, and in what manner it is to be performed, under the hand and seal of the patentee, which is to be enrolled in the Court of Chancery within two (*t*) calendar months from the date of the patent (*u*). Since the passing of the 11 & 12 Vict. c. 94, s. 14, re-enacted by the 12 & 13 Vict. c. 109, s. 15, this must be enrolled in the Enrolment office of the Court of Chancery. This instrument is called the specification of the patent; and it is required, in order that the public should be instructed by the inventor himself in the whole secret of the patent, which is the condition or price on which the limited monopoly is granted to him (*x*); and also in order that there may be certainty in the grant, without which grants by the Crown are

Title of letters patent.

Enrolment of the specification of the patent.

(*q*) *The King v. Wheeler*, 2 B. & Ald. 349; Hind. on Pat. 90; *Hornblower and another v. Boulton and another*, 8 T. R. 95.

(*r*) Gods. on Pat. 73; Web. on Pat. Append. 48; *Neilson's Patent*, Webs. Pat. Rep. 342; *Jupe v. Pratt*, Pat. Rep. 146; *Walton v. Potter*, 1 Scott's N. R. 90.

(*s*) Hind. on Pat. 69. This however must be accurate, and agree with the invention claimed in the specification, or the patent will be void for the false suggestion on which it has been obtained; Web. on Pat. 65, n.; *Jessop's case*, 2 H. Bla. 493; *Cockrane v. Smethurst*, 1 Stark. 205.

(*t*) Six calendar months, if a Scotch patent; Hind. on Pat. 70; but see Web.

on Pat. 68, n. (*h*); "The usual term inserted for enrolling the specification of an English patent is two months, for a Scotch patent four months, and for an Irish patent six months;" 6 Ves. 708.

(*u*) The reason for allowing this length of time for enrolling the specification is that the patentee may perfect his invention, including in the specification all such details as may be necessary for properly carrying out the idea which he had conceived at the time of obtaining the letters patent," *per* Lord Tenterden, in *Crossley v. Beverley*, 3 Car. & P. 513; 9 B. & C. 63; Web. on Pat. 84, n.

(*x*) Web. on Pat. 5; *Id.* 86, n.; *Har-mar v. Playne*, 11 East, 105; *per* Lord Ellenborough; and see 3 Mer. 161.

void (y), such grants being always construed strictly against the grantee (x).

Grounds for which letters patent are void.

Every such grant by letters patent of the sole right to make, use, exercise, and vend any invention, is void, if the invention was "not invented or found out" by the grantee, or first introduced into the kingdom by him (a); and also if the invention is not new (b), and useful to the public (c). It is also void for uncertainty (d), or for being too general (e); for misrecitals (f); for false suggestions, by which the Queen has been deceived (g) or misinformed (h) in her grant, or where she has granted more than she lawfully may (i), or what may be to the prejudice of the commonwealth, or to the general injury of the people (k); or where she has granted the same thing to two persons (l).

Entry of disclaimer.

As, however, a meritorious patent might be voidable for some of these defects, which formerly were incurable, without fault on the part of the patentee—as if the invention had been described in any document published before the grant of the patent, and without the patentee's knowledge, in any part of Great Britain or the colonies (m), or if the specification claimed as a part of the invention that which was old, or was inaccurate or insufficient in describing any part of the invention—and this strict construction led to many hardships, the 5 & 6 Will. IV. c. 88, was passed to

(y) *Boulton v. Bull*, 2 H. Bla. 483; and 1 Bulst. 10; Hind. on Pat. 69.

(x) Plow. 333; 1 Co. R. 45 a; 8 Co. 56 a; Bac. Abr. Prerog. F, 2, 514; Com. Dig. Grant, G. 12.

(a) Hind. on Pat. 21, 30; Gods. on Pat. 262, 269; Web. on Pat. 10; *Id.* 49, n. (g); *Edgberry v. Stephens*, 2 Salk. 446.

(b) Web. on Pat. 10; *Id.* 49, n. (f); *Crane v. Price*, 4 M. & Gr. 580; 1 Webs. R. 393; *Mitchell v. Reynolds*, 1 P. Wms. 181; Hind. on Pat. 102.

(c) *Manton v. Manton*, Dav. P. C. 333; Hind. on Pat. 133, 135; "For in order to support such a grant there must be some consideration given to the public by the patentee." *Manton v. Parker*, Dav. P. C. 327.

(d) 2 Rol. Abr. 196, 1, 30; Com. Dig. Grant, G, 6; Vin. Abr. Prerog. (G b, 2); *Boulton v. Bull*, 2 H. Bla. 483.

(e) 2 Rol. Abr. 193, 1, 41.

(f) *Englefield's case*, Moore, 318; *Needler v. Bishop of Winchester*, Hob. 224.

(g) Com. Dig. Grant, G, 8, 9; *Earl of Devon's case*, 11 Co. 90 a; 2 Tidd's Prac. 8th ed. 1142; Vin. Abr. Prerog. (N. B. 1); 4 Inst. 88; Bac. Abr. tit. Scire Facias, C, 3.

(h) *Alton Wood's case*, 1 Co. R. 52 a.

(i) Com. Dig. Grant, G, 8; *Alton Wood's case*, 1 Co. 49 a; Vin. Abr. Prerog. (G, b, 2); Hind. on Pat. 39, 48.

(k) Hind. on Pat. 62; Shep. Abr. Prerog. 48, sects. 5 & 7; 11 Co. 86, B; Com. Dig. tit. Patent, F, 4; *Dyer*, 276 b; *Rex v. Eyre*, 1 Stra. 43, which was a scire facias to repeal the grant of a market which was to the prejudice of another.

(l) 2 Tidd's Prac. 1142, 8th ed.

(m) *Brown v. Anandale*, 1 Webs. R. 433.

provide a remedy; and by the 1st section of that Act the grantee or assignee of a patent may, with the leave of her Majesty's Attorney or Solicitor General, enter a *disclaimer* with the Clerk of the Patents in England, "of any part of either the title of the invention, or of the specification, stating the reason for such disclaimer," which being "enrolled with the specification, shall be deemed and taken to be part of such letters patent, or such specification, in all Courts whatever" (n). By 11 & 12 Vict. c. 94, s. 14, re-enacted by 12 & 13 Vict. c. 109, s. 15, every disclaimer and memorandum of alteration must be *also* enrolled in the Enrolment office of the Court of Chancery. And by section 2 of 5 & 6 Will. IV. c. 83, if it shall be proved in any action or suit, and found by a jury, that the patentee was not the first inventor, or if the patentee shall discover that some other person, unknown to him, had invented and used the thing patented before the patent was granted, he or his assigns may petition her Majesty in Council to *confirm* the said letters patent; and if the Judicial Committee of the Privy Council shall report their opinion that the petition ought to be complied with, her Majesty may, if she think fit, grant its prayer, and the letters patent shall then be available in law and equity (o).

If letters patent be voidable for any one of the above defects, the patentee cannot enforce his privilege, as any of these matters may be pleaded to an action for infringing his patent, and, if substantiated before a jury, the issue will be found against him. By the Statute of Monopolies, such actions are to be tried by the common-law Courts of the realm and not otherwise (p). But although the infringement of an invalid grant may, by showing its defects, be justified in an action at law, yet, until the grant be actually cancelled, the patentee may proceed by action against different parties, and take his chance of being again beaten (q). Effect of a voidable patent.
Patentee may sue parties for infringing his patent until it be cancelled.

(n) Hind. on Pat. 203, 206; *Spilbury v. Clough*, 2 Q. B. 466; *Perry v. Skinner*, 2 M. & W. 471; see rules of practice as to, Web. on Pat. 63; and *Id.* 17, 18, 53, 55, 89; and see *Reg. v. Mill*, C. P., Mich. Term, 1850, 1 L. M. & P., which decided that, on a *scire facias* to repeal a patent, a disclaimer may be given in evidence at the trial as part of the specification, although it was not entered on the roll till after issue joined

(o) *Baron Heurtcloup's case*, 1 Webs.

R. 553; *Well's case*, 1 Webs. R. 554; Web. on Pat. 93.

(p) 21 Jac. I. c. 3, s. 2; 3 Inst. 182, 183.

(q) Gods. on Pat. 262; Web. on Pat. 31. In *Arkwright v. Mordaunt*, Dav. Pat. Ca. 69, the defendant had a verdict; and the plaintiff (the patentee) succeeded in the subsequent action of *Arkwright v. Nightingale*, *ib.* 37. The patent was subsequently repealed by *scire facias*. *Reg. v. Arkwright*, Dav. Pat. Ca. 61.

Of injunction to restrain further infringements.

The mode of proceeding to cancel the grant, as will be shortly shown, is by writ of *scire facias*. An action at law for infringing a patent, only meets the cases of *past* infringements, for which compensation in damages is sought to be recovered. In order to restrain any *future* invasion of his rights, the patentee must have recourse to a suit in equity, and obtain an injunction, commanding the person who has violated the patent right to refrain from any further infringements (*r*).

If any person imitates and counterfeits a patent article, and sells it as and for the patent article, he is liable to an action for a penalty of 50*l.* (*s*).

Assignment of patent.

A patent may be assigned, but it cannot become vested in more than twelve persons or their representatives at any one time, a proviso to that effect being always inserted in the grant (*t*). But the patentee may grant licenses for the use of his invention (*u*).

Extension of term of patent.

By statute 5 & 6 Will. IV. c. 83, s. 4 (amended by 2 & 3 Vict. c. 67, and extended by 7 & 8 Vict. c. 79) the Queen in Council is enabled to grant an extension of the term of the patent for seven years beyond the original term, if it shall be made appear to her Privy Council that the inventor has not been adequately remunerated for the cost and value of his invention (*x*).

How made void.

Having now given a very brief outline of the law respecting letters patent (which it is hoped will not be thought out of place, as making the application of the writ of *scire facias* in this instance more intelligible) defining the reasons for which they are granted, the privileges which they convey, and the defects for which they are voidable, we come to the chief object of the chapter, and proceed to detail in what manner they are made void and may be cancelled (*y*).

Construction of grants from the Crown.

In the construction of grants from the Crown, the general rule

(*r*) Hind. on Pat. 305; Web. on Pat. 26, 106; *Trew v. Guppy*, 1 M. & Cr. 487.

(*s*) 5 & 6 Will. IV. c. 83, s. 7.

(*t*) Hind. on Pat. 66, 234; Shep. Touch. 229, 231; Web. on Pat. 21, 82, 97; *Blosam v. Elsee*, 6 B. & C. 169.

(*u*) Such license gives no interest in the letters patent, but only a right of user of the invention. *Protheroe v. May*, 5 M. & W. 675; Web. on Pat. 23, 83, 103.

(*x*) Hind. on Pat. 75; Web. on Pat.

20, 57.

(*y*) If further information be required in detail on any branch of the subject above touched on, the reader is referred to the cases and books cited, which will be found amply sufficient for that object, and particularly to Mr. Hindmarch's excellent treatise, of which the author has largely availed himself, and which he has found generally most full and accurate. Also to the statutes 11 & 12 Vict. c. 94, and 12 & 13 Vict. c. 109.

is that they be construed most favourably for the Queen where a fair doubt exists as to the real meaning of the instrument (z).

But this rule is subject to many limitations and exceptions; and one of these exceptions is, "that the construction and leaning shall be in favour of the subject, if the grant shows that it was not made at the solicitation of the grantee; but *ex speciali gratiâ, certâ scientiâ et mero motu Regis*; though these words do not of themselves protect the grantee against false recitals," &c. (a); and if the Queen's grants are upon a valuable consideration, they shall be construed strictly for the patentee for the honour of the Queen. "So where the Queen's grant is capable of two constructions, by the one of which it will be valid, and by the other void, it shall receive that interpretation which shall give it effect, for that will be more for the benefit of the subject, and the honour of the King, which ought to be more regarded than his profit" (b). The form generally used in the grant of letters patent for inventions is a literal translation of the old form of words, "*ex speciali gratiâ*," &c. "Know ye therefore, that we of our especial grace, certain knowledge, and mere motion have given and granted, and by these presents for us, our heirs and successors do give and grant," &c., and unless the Queen be deceived by a false suggestion the grant is for "valuable consideration," in giving to the public after the term of the patent privilege has expired, a *new and useful* trade or invention. On these grounds letters patent for inventions are construed, and adjudged in the most favourable and beneficial sense for the best advantage of the grantee, notwithstanding any defective and uncertain description of the nature and quality of the invention and of its materials (c); moreover there is a clause usually inserted in the letters patent, whereby this construction is expressly granted (d).

If a patent be void for any of the reasons which have been *Scire facias* by the

(z) Gods. on Pat. 200; Chit. jun. Prerogative of the Crown, 391; Web. on Pat. 76, n.; Hind. on Pat. 38.

(a) Chit. jun. Prerog. of the Crown, 393-4; "The phrase *ex speciali gratiâ* implies bounty; *ex certâ scientiâ* imports science and knowledge; *ex mero motu* manifests that the grant is not made upon the suggestion or suit of the party; but all these are not of any effect or operation if the King be deceived, or if the intent or purpose of his

grant cannot by law take effect. *Case of Alton Woods*, 1 Co. Rep. 27. "For these words (*ex speciali gratiâ*, &c.) shall not produce a strainable construction against the rules of law or in *deceptionem Regis*." *Ib.*; and see Web. on Pat. 77, n.

(b) Chit. Prerog. of the Crown, 393, 394; Gods. on Pat. 202.

(c) Gods. on Pat. 24.

(d) *Ib.* 203; and see Hind. on Pat. 39.

Queen to
repeal her
grant.

briefly assigned (e), as sufficient to invalidate the grant, the Queen *jure regio*, for the advancement of justice and right, may have a *scire facias* to repeal her own grant (f). A *scire facias* is the only means which the law provides for the repealing of letters patent (g); and it lies at the suit of the Queen (h).

Scire facias
by subject
to repeal a
patent.

The subject also who is prejudiced by a grant may of right petition the Queen for leave to use her name in a writ of *scire facias* for its repeal (i).

When same
grant made
to two per-
sons sepa-
rately.

Between subject and subject, if the Queen has granted a patent to each of them for the same thing, generally the first patentee may have a *scire facias* to repeal the second patent (k); but the

(e) See *ante*, p. 242, and Hind. on Pat. 266.

(f) 4 Inst. 88; *Rex v. Sir Oliver Butler*, 3 Lev. 220. *Scire facias* to repeal letters patent granting to the defendant the privilege to hold a market on Tuesdays, at the town of Chatham, which was alleged to be injurious to the city of Rochester, the letters patent having been granted on the suggestion that it would not be injurious to the King or any other person, if the King granted the said market. Held, on error, in the House of Lords, "that the King has an undoubted right to repeal a patent wherein he is deceived, or his subjects prejudiced, and that by *scire facias*. In the *Magdalen College case*, 11 Co. Rep. 74 b, it was said, "The law has given the King a great prerogative above any of his subjects, that where by fraud or false suggestion he is deceived, he himself in such cases shall avoid his own grant *jure regio*." And see *Legat's case*, 10 Co. Rep. 113 b; Hind. on Pat. 379.

(g) Hind. on Pat. 64; Godson on Pat. 270.

(h) A *scire facias* by the Queen, to repeal a patent upon a forfeiture of office, ought to set forth the cause of forfeiture. Dyer, 198 b; 2 Wms. Saund. 6th ed. 72, n.

(i) *Smith v. Upton*, M. & Gr. 251, n. (a); Godson on Pat. 270;

Brewster v. Weld, 6 Mod. R. 229; *Rex v. Eyre*, 1 Stra. 43; 2 Bac. Abr. Prerogative, F, 1. In *Sir Oliver Butler's case*, as reported in 2 Vent. 344, Lord Chancellor Finch said, "Where a patent is granted to the prejudice of the subject, the King of right is to permit him, upon his petition, to use his name for the repeal of it, in a *scire facias* at the King's suit, and to hinder multiplicity of actions upon the case, for such action will lie notwithstanding such void patent." And see *Reg. v. Acres*, 10 Mod. 354: 1 P. Wms. 217; Vin. Abr. Prerog. (M. b. 9), pl. 10 (U. b.)²pl. 8. And see Hind. on Pat. p. 385,—"A void or illegal patent for an invention, is in law prejudicial to every one of her Majesty's subjects, for it commands them to abstain from the use of the art or invention comprised in it. For this reason every person is presumed to have such an interest in a patent for an invention, that if he alleges that it is illegal or void, he is entitled as of right to a *scire facias* in the name of the Queen, in order to repeal it.

(k) 2 Wms. Saund. 6th ed. 72, n.; 4 Inst. 88; Dyer, 197 b, 198 a; Com. Dig. Patent, F, 6. If there be simultaneous inventors, he who first publishes, under letters patent, has the right to the patent; *Forsyth v. Rivière*, Chitty, Prerog. of Crown, 182. In practice letters patent bear date the

second patentee cannot bring a *scire facias* to repeal the first patent though the better right should be in him (*l*). In the case of two patents for the same invention, supposing the object of the patent to have been simultaneously discovered by the patentees, the second grant would necessarily be bad, even if the first were for some informality rendered invalid (*m*).

It has been already shown (*n*), that a *scire facias* for repealing letters patent is an original writ, and must be founded on the record of the patent (*o*), which being enrolled in Chancery (*p*), the writ must issue out of that Court (*q*).

Scire facias to repeal letters patent an original writ.

It was formerly the practice to present a petition to the Crown, praying for leave to sue out a *scire facias*, to repeal a patent containing a grant of land, or of a market, or any similar grant (*r*); but that practice never prevailed with respect to actions of *scire facias* to repeal patents for inventions (*s*). Until the passing of the 11 & 12 Vict. c. 94, it was the practice for the clerk of the Petty Bag in Chancery to prepare the writ of *scire facias*, to repeal a patent for an invention, all the necessary particulars to enable him to prepare the writ being furnished to him by the prosecutor's solicitor (*t*). Since that Act, and also by the 4th and 5th sects. of 12 & 13 Vict. c. 109, the clerk of the Petty Bag is prohibited from acting as attorney or solicitor, in the office of the Petty Bag on behalf of any person. The office called "The Petty

Writs of *scire facias* to repeal letters patent formerly prepared by a clerk of the Petty Bag office.

day of the sealing; but in case of opposition, the Chancellor will allow the prayer of a petition, that the letters patent may bear date the day on which the Queen's warrant (the Privy Seal Bill) is left with the Chancellor (Web. on Pat. 33, n. (*a*)). And see stat. 6 Hen. VIII. c. 15; Web. on Pat. p. 32. "When the King, by his letters patent, doth grant by several letters patent one and the self-same thing to several persons, the first patentee shall have a *scire facias* to repeal the second."—4 Inst. 88; Bac. Abr. tit. *Scire Facias*, C, 3; 2 Tidd, Pr. 8th ed. 1143; Com. Dig. tit. Patent, F, 4.

(*l*) *Basset v. Corporation of Torrington*, Dyer, 276 b.

(*m*) Gods. on Pat. 31, 40, 270; *Boulton v. Bull*, 2 H. Bla. 487; *Forryth v. Rivière*, Chitty, jun. Prerog.

of Crown, 182, n.

(*n*) *Ante*, book iii. ch. i. p. 228.

(*o*) 4 Inst. 88; *The King v. Butler*, 3 Lev. 223; 2 Tidd, Pr. 8th ed. 1143.

(*p*) See the 12 & 13 Vict. c. 109, s. 15.

(*q*) It seems to be clear that a *scire facias* to repeal a patent can only be in Chancery (Bro. Abr. tit. *Petit. pl.* 11), and that it could not issue out of the Court of Queen's Bench; for as the writ must be founded on some matter of record, that Court has no enrolment of the patent or other record upon which the writ could be founded. (Jenk. Rep. 134, 3rd century case, 74; Com. Dig. tit. Patent, F, 7; Hind. on Pat. 381-3; *sed vide* 4 Inst. 72.)

(*r*) 2 Rich. Prac. C. C. 391, 392, 395; Gods. on Pat. 271.

(*s*) Hind. on Pat. 385.

(*t*) Hind. on Pat. 385, 386.

Solicitors
now en-
titled to
practise in
the Petty
Bag office.

Bag" being the office of the Court of Chancery, in which all the common-law proceedings of the Court are carried on, all pleadings and other common-law proceedings in Chancery, before that statute, were entitled, "In the Petty Bag Office in Chancery," and out of which the *scire facias* issues (r). Now by the 21st section of that Act, (s), and by the 24th sect of 12 & 13 Vict. c. 109, every person who is admitted a solicitor of the Court of Chancery, "shall, by virtue of his admission and this Act, become and be an attorney of the said Court; and every person hereafter to be admitted a solicitor of the said court, shall, by virtue of such admission, become an attorney of the said Court. And every person so to become or be admitted an attorney of the said Court as aforesaid, shall be allowed and entitled to practise as an attorney on the common-law side of the said Court of Chancery, any law or usage to the contrary notwithstanding, upon payment nevertheless of such fees as shall or may be payable in respect of the business transacted by the said attorneys; and all such documents, proceedings, writings, acts, duties, services, matters, and things as before the passing of this Act were or ought to be prepared, conducted, done, or performed by the senior, second, and third clerks of the Petty Bag respectively, as the attorneys of and for their clients, respectively shall or may from and after the passing of this Act be prepared, conducted, done, and performed by such clients respectively, in their own proper persons, or by some person who shall become, or be admitted and actually be an attorney of the said Court by virtue of this Act, and not by any other person whomsoever."

Sealing of
the writ.

And by the 38th sect. of the 12 & 13 Vict. c. 109, it is enacted, "that every writ which shall or may (at any time after this Act shall come into operation) lawfully issue out of the said

(r) Hind. on Pat. 383; 2 Wms. Saund. 72, n. "A *scire facias* for repealing a patent may be sued in the Petty Bag in Chancery, for it is a record there;" 4 Inst. 88; *Sir Oliver Butler's case*, 3 Lev. 223. Sir Edm. Coke, in his 4th Inst. c. 8, p. 79, says, "that in the Chancery there are two Courts, one ordinary, *coram domino Rege in Cancellaria*, wherein the Lord Chancellor, or Lord Keeper of the Great Seal, proceeds according to the right line of the laws and statutes of the realm, *secundum legem et consuetudinem Angliæ*; an-

other extraordinary, according to the rule of equity, *secundum æquum et bonum*." And that of the former or common-law Court, the Lord Chancellor or Lord Keeper is the sole judge; but, in cases of difficulty, he may call to his assistance any of the judges of the common-law Courts; *Ross v. Pope*, Flow. 72; Hind. on Pat. 379.

(s) 11 & 12 Vict. c. 94, s. 21, re-enacted, in *totidem verbis*, by the 12 & 13 Vict. c. 109, s. 24.

office of the Petty Bag, under the said Chancery common-law seal (*t*) ; and every record and proceeding whatsoever on the common-law side of the said Court of Chancery, shall be prepared, engrossed, and issued by the party requiring or conducting the same, subject, nevertheless, to such rules and regulations as shall or may be made for the time being, in force by virtue of this Act or otherwise, for regulating the practice of the common-law side of the said Court of Chancery, and also subject to the payment of such lawful fees as shall or may be payable for or in respect thereof; and upon payment of such fees, and complying with such rules, such writs, records, and proceedings, shall, when necessary (and if lawful and regular), be duly sealed."

The prosecutor, or his solicitor, having prepared a draught of the writ, as directed by the above statute, must lay a fair copy of it before the Attorney-General, together with a statement of the facts on which it is founded, in order to obtain his fiat, which must be filed in the Petty Bag office, to authorize the issuing of the writ, and without which the writ cannot be sealed (*u*). The fiat is obtained as a matter of course, and indorsed upon the back of the copy of the writ, which on being verified by affidavit, and filed in the Petty Bag office (*w*), authorizes the prosecutor to bring the action in the name of the Queen (*x*), to revoke and cancel the patent.

Fiat of Attorney-General to authorize the issuing of the writ.

Before, however, acting as the attorney of any person on the common-law side of the Court of Chancery, the attorney must cause to be entered in a book, kept in the Petty Bag office, his name and address, or some place at or to which pleadings, notices, or other proceedings may be left for or sent to him (*y*).

The attorney having obtained the fiat of the Attorney-General, must then indorse on the copy of the writ the name of some one of the superior Courts of law in which he intends the action to be tried, and the writ will then be sealed (*z*).

Indorsement of name of superior Court in which the action is to be tried.

The statute 11 & 12 Vict. c. 94, s. 26, enacted that the name of the person bringing such action should be inserted in the writ, and that he should be deemed to be the prosecutor of such action. That statute is, however, repealed (except some provisions as to

The action brought in the name of the Queen.

(*t*) The seal ordered to be provided by the Stat. sec. 11 ; see *post*, p. 252.

(*u*) Hind. on Pat. 386 ; Gods. on Pat. 271 ; 2 Rich. Prac. C. P. 391 ; 2 Wms. Saund. 6th ed. 72, n. ; 2 Tidd, Pr. 8th ed. 1143. See the New Orders in Chancery, No. 14, dated the 3rd of August, 1849 ; *post*, Append.

(*w*) See No. 14 of the New Orders in Chancery, Append. *post*.

(*x*) Hind. on Pat. 386 ; 2 Tidd, Pr. 8th ed. 1143.

(*y*) 12 & 13 Vict. c. 109, s. 44.

(*z*) New Orders in Chancery, Nos. 14 and 16 ; *post*, Append.

the clerks of the Petty Bag) by the 12 & 13 Vict. c. 109, and this provision is not re-enacted. The action must therefore, as before that statute, be brought in the name of the Queen.

Bond of indemnity.

It has been the practice of Attorneys-General only to grant the requisite *fiat* to enable the prosecutor to sue in the name of the Queen, on condition that he enters into a bond of indemnity, to be taken in the name of the clerk of the Petty Bag, with two sufficient sureties in ordinary cases, and for such sum as the Attorney-General shall name, to pay the patentee the amount of his costs taxed as between attorney and client, if the action against him should fail (*a*). The object of this security is to prevent patentees being vexatiously harassed by actions of *scire facias*, in which, if they succeeded, they could not recover costs against the prosecutor (*b*). The prosecutor's attorney must certify that the sureties are sufficient, and any knowing misrepresentation on his part in this respect would be deemed a contempt of the Court (*b*). The clerk of the Petty Bag, or one of his clerks, attests the execution of the bond in town cases: in the country it must be attested by a Master Extraordinary in Chancery (*c*).

Form of writ.

The *scire facias* in form recites the patent, and refers to the enrolment of the patent in verification. The writ then states the grounds upon which the patent is meant to be impeached by the prosecutor of the action, commencing with the words, "Whereas we are given to understand that," &c. (*d*)—an allegation in a *scire facias* commencing with these words having been held sufficient to put the defendant to answer it (*e*); and proceeds to suggest, "That our said grant was and is contrary to law, and was and is prejudicial and inconvenient to our subjects in general;" and then proceeds to particularize the grounds relied on, in support of this general averment (*f*); as that the patentee was not the first and true inventor, or importer, &c., and concludes thus:—"By reason and means of which said several premises, the said letters patent so as aforesaid granted to the said A. B., are and ought to be void and of no force or effect in law" (*g*). The writ then

(*a*) New Orders in Chancery, Nos. 17 and 18; and see *post*, p. 276; and see *Reg. v. Mill*, C. P., Mich. Term, 1850—cited *supra*, p. 243, n. (*n*).

(*b*) Hind. on Pat. 386. The Crown at common law not paying costs. See *Attorney-General v. The Mayor, &c. of London*, 18 L. J., N. S., Chan. 339.

(*c*) Hind. on Pat. 387.

(*d*) Gods. on Pat. 271; Hind. on Pat. 389.

(*e*) *Rex v. Butler*, 3 Lev. 222, in the House of Lords.

(*f*) See *The King v. Arkwright*, Dav. P. C. 79.

(*g*) Gods. on Pat. 271; Hind. on Pat. 389; and see references to forms, Append.

recites that the Queen being willing that what is just should be done, commands the sheriff to summon the defendant to appear in Chancery on a certain day, to show if he has anything to say why the patent and the enrolment of it should not, for the reason stated in the writ, be cancelled and vacated, and the letters patent be restored into Chancery, there to be cancelled.

This writ must be tested or dated on the day on which it is sealed (*h*), and may be issued or tested on any day, not being a Sunday, Good Friday, or Christmas Day, in term time or in vacation (*i*). When may be issued.

The person to be made defendant in the action should be the patentee, if entitled to the patent, as he has the custody of it, and may be compelled to restore it into Chancery, to be cancelled, if the Court should give judgment for the Crown (*k*). If he have assigned a part of his patent right, his assignee should be made jointly defendant with him. If he have parted with the whole of his interest by assignment, bankruptcy, or otherwise, then his assignee or assignees should be made defendant or defendants, he or they having the custody of the patent (*l*). And it would seem that if the action were to proceed against the patentee to trial, and judgment should be for the prosecutor of the action, after the patentee had assigned his whole interest in the patent, that the judgment ought not to prevail against the assignee, for he would be no party to it; and the action might have been carried on by collusion with the patentee, without the assignee (who alone was interested in the patent) having any notice of the proceeding (*m*). And if a *scire facias* were to be issued against a deceased patentee, it would also seem that the judgment in such an action would be erroneous, for there would be no person who could be summoned, or who could answer the suggestions contained in the writ, and the parties actually entitled to the patent privilege might have a good defence to the action (*n*). The person to be made defendant.

(*h*) See No. 6 of the New Orders in Chancery, 1849; Append. *post*.

(*i*) 12 & 13 Vict. c. 109, s. 26. This section enacts, "That every writ of any description whatsoever, thereafter to be issued out of the office of the Petty Bag, shall or may be issued or tested on any day not being a Sunday, Good Friday, or Christmas Day, whether such day shall be in term-time or in vacation; and every such writ, so issued or tested on any

day in vacation, and which, according to any present law or usage or practice of or in the said Court of Chancery ought to be tested on some day in term time, shall be of the like validity, force, and effect, as if the day of the issuing or testing of such writ was actually a day in term time."

(*k*) Hind. on Pat. 388, 398.

(*l*) Web. on Pat. 22.

(*m*) Hind. on Pat. 399.

(*n*) *Ib.* 388.

In some cases where the patent has been assigned, the prosecutor may not have any certain knowledge respecting the assignment, and it will then be safer to make the patentee and the assignee joint defendants in the action, leaving the patentee to plead the assignment in abatement or in bar to the action (o).

Sealing of
the writ.

The writ, before it is issued, must be sealed in the Court of Chancery with the common-law seal (p). Formerly it was necessary that it should be sealed with the great seal, for which purpose it was taken by a clerk in the Petty Bag office to the great seal on certain appointed days (q); since the 11 & 12 Vict. c. 94, and the 12 & 13 Vict. c. 109, this is no longer necessary. The former Act directs, by the 11th section, which is re-enacted by the 12 & 13 Vict. c. 109, s. 11 (r), that a seal shall be provided and kept for the Court of Chancery, to be called "The Chancery Common-law Seal," of which "all courts, tribunals, judges, justices, officers and other persons shall take notice, and receive impressions thereof in evidence, in like manner as impressions of the great seal are received in evidence (s);" and by the 14th

The Chan-
cery com-
mon-law
seal.

(o) Hind. on Pat. 388.

(p) See New Orders in Chancery, No. 4; *post*, Append.

(q) Hind. on Pat. 390.

(r) The following is the section of the 12 & 13 Vict. c. 109, sect. 11: "That a seal shall be provided and kept for the said Court [of Chancery], which shall be and be called the Chancery Common-law Seal, and such seal shall be in such form as the Lord High Chancellor, with the advice and assistance of the Master of the Rolls, shall or may from time to time order or direct; and the said Lord Chancellor, with such advice and assistance as aforesaid, shall or may from time to time order or direct that any seal for the time being so provided or kept as aforesaid, shall be cancelled or laid aside, and another seal substituted, kept, and used in lieu thereof; and all courts, tribunals, judges, justices, officers, and other persons whomsoever, shall take notice of the said seal, and receive impressions thereof in evidence in like manner as impressions of the great

seal are received in evidence, and shall also take notice of and receive in evidence, without further proof, all and every of such writs, proceedings, instruments, documents, and writings whatsoever, which shall purport or appear to be sealed or stamped with the said Chancery common-law seal for the time being, in like manner as if the same had been sealed with the great seal."

(s) By the 12th section, a certificate stating that specifications, deeds, and other instruments are enrolled in the Petty Bag office, may be stamped, on payment of the proper fees, with the Chancery common-law seal, which is enacted to be sufficient *prima facie* evidence of the due enrolment in the Petty Bag office of such specification, deed, or instrument. And by the 13th section, office copies issued from the Petty Bag office of any document or record, and sealed with the Chancery common-law seal, shall be deemed to be true copies and admitted in evidence as such.

section of the 12th & 13th Vict. c. 109, it is enacted, "that all rules and orders issued out of the Petty Bag office, and all such writs, records, instruments, documents, proceedings, and writings as are or have been usually issued or delivered out of the Petty Bag office, and made under or sealed with the great seal," (with certain exceptions therein named (*t*)) "shall be made under or sealed or stamped with the said Chancery common-law seal for the time being; and every writ, record, document, instrument, proceeding, and writing, which shall or may be made under or sealed, or stamped with the said Chancery common-law seal for the time being, shall be of the like validity, and shall have the same force and effect as if the same had been or were made or sealed with the great seal."

By the 17th section of the 12th & 13th Vict. c. 109, a seal is also to be provided for the Enrolment office, to be approved by the Master of the Rolls, and to be called "The Seal of the Enrolment Office in Chancery," and all courts, tribunals, judges, justices, officers, and other persons are to take notice and receive in evidence specifications, deeds, and every instrument and writing purporting or appearing to be stamped therewith, without further proof. By the 18th section, the clerk of the Enrolment office may write upon any deed or specification a certificate that it has been enrolled in Chancery, which, when stamped with the seal of the Enrolment office in Chancery, such seal is to be *prima facie* evidence that the deed, specification, &c., was duly enrolled on the day mentioned in the certificate. And by the 19th section, copies of any enrolment or other record, stamped with the seal of the Chancery Enrolment office, and purporting to be such copy, shall be deemed to be a true copy, and shall, without further proof, be admitted in evidence before either House of Parliament, and in all courts. By the 20th section, forging any seal kept in pursuance of this Act, is made felony.

Seal of the
Enrolment
office in
Chancery.

By the 21st section, a table of fees is to be established by the Lord Chancellor, with the advice and assistance of the Master of the Rolls, for the Petty Bag office: but it is provided, "that no fees whatever shall be demanded or received by the clerk of the Petty Bag, or by any person employed by him in the said office,

(*t*) "Except *conges d'elire*, royal assent, patent of assistance and writs of restitution of temporalities on the election of an archbishop or bishop, special commission of inquiry, writs of

mittimus to the Lord Chancellor of Ireland, exemplifications and writs of summons, and writs of election issued on the calling of a new Parliament."

for or in respect of any act, duty, or service required to be done performed, or rendered by him, them, or any of them, in the course of any proceedings carried on in the said office *directly at her said Majesty's instance, suit and charge* (except such fees as have been heretofore payable for the writs of summons and writs of election and other fees on the calling of a new Parliament), and the said clerk of the Petty Bag, and the several persons employed by him in the said office, are thereby authorized and required to perform and render such acts, duties, and services, as may be required in the course of such last-mentioned proceedings, without payment of any fee whatsoever in respect thereof, except as aforesaid."

The writ may be directed to the sheriff of any county.

Formerly the practice was always to direct the writ of *scire facias* first issued to the sheriff of Middlesex, because the record on which the writ is founded remains at Westminster in that county (u): and if the defendant resided out of the county, on a return of *nihil* by the sheriff to that writ, to issue a second writ founded upon it, called a *testatum* writ, directed to the sheriff of the county in which the defendant resided (x). Now, however, by the 29th section of the 12th & 13th Vict. c. 109, it is enacted, "that any writ of *scire facias* for repealing, cancelling, or vacating any letters patent or charter which shall or may at any time thereafter be issued in any action at the suit of her Majesty, thereafter to be commenced, shall or may be directed and sent to the sheriff of any county in England or Wales, although the record upon which such writ shall be founded or issued may be or remain in the county of Middlesex, or any other county, and that it shall not be necessary that any such writ which at any time thereafter may be issued and directed to the sheriff of any such county as aforesaid, shall be a *testatum* writ, or founded upon any previous writ directed or sent to the sheriff of Middlesex or any other county."

Where returnable.

When returnable.

The *scire facias* and all other writs to be returned into Chancery are, in point of form, made returnable in Chancery wheresoever it shall be on the return day (y). It may, however, be made returnable in any of the superior Courts of common law (z); and it may be made returnable, and returned

(u) Hind. on Pat. 388.

(x) Hind. on Pat. 391.

(y) Hind. on Pat. 390; *The King v. Hare*, 1 Stra. 146. But where made returnable wheresoever the Chancery

should be in *Great Britain*, it was held bad. *Id.* and see *Sir C. Moore's case*, cited 1 Stra. 153.

(z) Jenkin's Rep. p. 134, 3rd century, pl. 74; *Brewster v. Weld*, 6

on any day certain in the writ mentioned (not being a Sunday, Good Friday, or Chistmas day), whether such day shall be in term time, or in vacation, or forthwith after the execution thereof, provided that the period of time which ought to elapse between the teste and the return of the writ shall have elapsed (*a*). Every writ of *scire facias* to repeal a patent must be tested or dated on the day on which it is sealed (*b*), and when returned by the sheriff immediately filed, the day and hour of the filing being indorsed on the writ (*c*).

According to the old practice, the first writ must have been lodged in the Sheriff's office two days at least before the return day; and it was necessary for the second or *testatum* writ to lie four clear days in the Sheriff's office, exclusive of the day of lodging it, the day of the return, and any intervening Sunday (*d*). And it seems there ought to be fifteen days at least between the teste and the return of the writ (*e*). When tested.

A summons is then sent to the defendant by the sheriff in pursuance of the writ, informing him that the writ has been issued against him, and warning him to appear to it (*f*). If the defendant reside or have a place of business in the county, he may be summoned by leaving the copy of the writ and summons at his Summons to defendant.

Mod. 229; Hind. on Pat. 382; 12 & 13 Vict. c. 109, s. 27; see next note.

(*a*) 12 & 13 Vict. c. 109, s. 27. The following is the section referred to:—"And be it enacted that every writ of any description whatsoever, hereafter to be issued out of the said office of the Petty Bag, whether the same shall or may be returnable in the same Court, or in any other of her Majesty's superior Courts of common law, shall or may be made returnable, and returned on any day certain to be in such writ mentioned (not being a Sunday, Good Friday, or Christmas Day), whether such day shall be in term-time, or in vacation, or forthwith after the execution thereof; and every such writ which shall be made returnable, or returned on any day in vacation, and which according to any present law, or usage, or practice of or in

the said office of the Petty Bag, ought to be made returnable, or to be returned on some day in term-time, shall be of the like validity, force, and effect, as if the day upon which the same writ shall or may be returned or made returnable was actually a day in term time; provided always, that in every case in which any particular period of time ought to elapse between the teste and return of any writ, such writ, if made returnable forthwith after the execution thereof, shall be returned immediately after the execution thereof, and after such period shall have elapsed."

(*b*) New Orders in Chancery, No. 6; see Append. *post*.

(*c*) *Ib.* No. 7; *post*, Append.

(*d*) Hind. on Pat. 392.

(*e*) *Ib.* 389.

(*f*) Gods. on Pat. 271; Tidd, Pr. 1158—1172.

Return to
the writ.

dwelling-house or place of business, as personal service is not necessary. After the defendant has been summoned, the sheriff makes his return of *scire facias* to the writ. If the sheriff should neglect to make a return to the writ, he may be compelled by a rule of the Court to do so. The rule is obtainable at the office of the Petty Bag on application (g).

Notice to
the defend-
ant.

If the defendant should not be summoned, (for it is not absolutely necessary that he should be (h),) provided the writ be duly returned, the more prudent course for the prosecutor, before proceeding to sign judgment against him for default of appearance, would be to give him notice of the writ; otherwise, if he could show to the Court that he had had no notice of the proceedings, the judgment would probably be set aside, and he would be let in to plead and defend the action (i).

An appeal by or on behalf of any defendant who has been summoned by the sheriff, must be entered within eight days after the writ of *scire facias* has been returned and filed (k).

Rule to the
defendant
to answer
the writ.

Upon the return of *scire facias* or *nihil* by the sheriff, the prosecutor of the action may enter a rule on any day in term or vacation (except Sunday, Good Friday, or Christmas Day) (l), for the defendant to answer the matters in the writ, for the writ is in the nature of a declaration (m), and the defendant must appear and answer within eight days, or in default the Crown will be entitled to judgment (n). The eight days are to be reckoned exclusive of the day of entering the rule, and exclusive of the last day if it be a Sunday (o).

Judgment
by default.

The effect of a judgment by default, or by confession, is to avoid the patent (p).

Appear-
ance.

In order to appear to the writ, the defendant or his solicitor (q) must enter an appearance in the Petty Bag office, paying the fees which are made payable in that respect; solicitors duly admitted

(g) Hind. on Pat. 392.

(h) *Rex v. Eston*, Dyer, 198 a.

(i) Hind. on Pat. 392.

(k) *New Orders in Chancery*, 1849, No. 19; see *post*, Append.

(l) 12 & 13 Vict. c. 109, s. 28; see reference to form, *post*, Append.

(m) *Vaughan v. Flood*, 1 Sid. 406.

(n) Judgment in a *scire facias* to repeal a patent, may be by confession or by default, if the defendant be returned warned upon two *nihilis*. Dyer,

107 b, 198 a; 2 Rol. Abr. 192, X, pl. 1; 2 Wms. Saund. 6th ed. 72, n.; 2 Tidd, Pr. 8th ed. 1144.

(o) Hind. on Pat. 391.

(p) H. T. 4 Hen. VII. 12 B.; Bro. Pat. pl. 20; *Scire Facias*, pl. 131, 138; *The King v. Toly*, Dyer, 197 b; *Rex v. Bluge*, *ib.*; *Rex v. Amery*, 2 T. R. 654; Com. Dig. tit Patent, F, 8.

(q) 12 & 13 Vict. c. 109, s. 24; see *ante*, p. 248.

to practise in the Court of Chancery, being, by virtue of the 12 & 13 Vict. c. 109, s. 24, entitled now to practise as attorneys on the common-law side of the Court of Chancery in lieu of the clerks of the Petty Bag.

If the defendant appear to defend the action, the prosecutor of the action, or his attorney, must deliver to the defendant, or his attorney, the declaration in the action, and also at the same time a notice of any objections on which he means to rely at the trial of such action (r). Delivery of declaration.

The declaration and notice of objections may be delivered at any time, or on any day not being a Sunday, Good Friday, or Christmas day, in term time, or in vacation (s); and since the When declaration may be delivered.

(r) 12 & 13 Vict. c. 109, s. 30, by which it is enacted, "That in case any defendant in any action, suit, or proceeding, already or hereafter to be commenced, shall appear on the common-law side of the Court of Chancery, in person or by attorney, to answer in such action, suit, or proceeding, it shall not be necessary to file any declaration: but the plaintiff or prosecutor, or his attorney, shall deliver the declaration to such defendant or his attorney, and shall also at the same time, in any action of *scire facias*, to repeal letters patent for inventions, deliver to such defendant, or his attorney, the notice of objections (if any) required by the provisions of an Act passed in the sixth year of the reign of his late Majesty King William the Fourth, intitled, 'An Act to amend the Law touching Letters Patent for Inventions;' and it shall not be necessary, at any time hereafter, to file any notice of objections required by the said last-mentioned Act, but only to deliver the same to the defendant or his attorney, as required by this Act."

The following is the section of the statute of 6th Will. IV. referred to:—By the 5 & 6 Will. IV. c. 83, s. 5, it is enacted, "That in any action brought against any person for infringing any letters patent, the defendant, on pleading thereto, shall

give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively, at such trial unless he prove the objections stated in such notice: Provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively, to show cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit."

(s) 12 & 13 Vict. c. 109, s. 28, by which it is enacted, "That every rule, order, *pleading*, judgment, execution, proceeding, act, business, matter and thing, to be made, entered, intitled, filed, given, issued, taken, transacted, done, or performed, in or by the said Court of Chancery, at any time after the passing of this Act, shall or may be so made, taken, transacted, done, or performed, on any day not being a Sunday, Good Friday, or Christmas Day, whether such day shall be in term time or in vacation;

statutes 11 & 12 Vict. c. 94, and 12 & 13 Vict. c. 109, must be "entitled of the day of the month and year on which it is delivered," in the same manner as any other ordinary declaration.

Form of
declaration.

The declaration sets out the writ of *scire facias* with the return of the sheriff thereto, and the appearance of the defendant; and then concludes with a prayer of judgment by the Attorney-General, that the patent and enrolment may be cancelled, vacated, and disallowed, and the patent restored into Chancery, there to be cancelled (t).

The rule to answer is the only rule which is necessary to compel the defendant to plead, as the defendant answers upon the writ (u).

Why judges
of the su-
perior courts
have au-
thority to
determine
all inci-
dental ap-
plications.

The superior Courts of common law, (under the 12 & 13 Vict. c. 109, s. 39,) and the judges thereof respectively have the same authority to hear and determine all matters or applications arising in, or incident to any such action as the Lord Chancellor or the Master of the Rolls had before this statute and the 11 & 12 Vict. c. 94, which contained a similar enactment (x); and if the notice

and every such rule, order, *pleading*, judgment, execution, proceeding, act, business, matter and thing, as aforesaid, which shall be so made, entered, intituled, filed, given, issued, taken, transacted, done, or performed, in vacation or on any day in term time, or in vacation, and which according to any present law, or any present practice or usage of the said office of the Petty Bag can or ought only to be made, entered, intituled, filed, given, issued, taken, transacted, done, or performed in term-time, or as in term time, or as on any or some particular day or days in term time, shall be of the like validity, force, and effect, as if the day upon which the same shall or may be so made, entered, intituled, filed, given, issued, taken, transacted, done, or performed, was actually a day in term time; and as if the same was actually made, entered, intituled, filed, given, issued, taken, transacted, done, or performed in term time, and not in vacation, and the day or one of the days in term time required by any such law, practice, or usage as aforesaid."

(t) See reference to form, *post*, Appendix.

(u) Hind. on Pat. 394.

(x) The 39th section of the 12 & 13 Vict. c. 109, enacts, "That in every action, suit, and proceeding now pending, or which at any time hereafter shall be commenced or pending in the said Court of Chancery, on the common-law side thereof, it shall be lawful for the superior Courts of common law, and the judges thereof respectively, and they are hereby respectively required to hear and determine all such matters or applications arising in, or incident to, any such action, suit, or proceedings as aforesaid, as before the passing of this Act might have been heard and determined by the Lord Chancellor and the Master of the Rolls, or either of them; and also to transact, do, and perform all such business, matters, and things, in, about, touching, or concerning any action, suit, or proceedings on the common-law side of the said Court of Chancery, as by virtue of any order or regulations for the time being in force, by

if objections delivered by the prosecutor be insufficient, the Master of the Rolls, or any of the judges of the superior Courts, will, upon the application of the defendant, order the prosecutor to amend his notice, or to deliver a further and better notice (y).

The defendant has eight days from the delivery of the declaration in which to plead (z); and should he fail to plead before the closing of the Petty Bag office, on the last day of his time to plead, judgment may be signed against him by *nil dicit* on the opening of the office on the following morning (a), and the patent will be repealed.

If necessary the defendant may obtain further time to plead, by application to the Master of the Rolls, or to one of the judges of the superior Courts, (b), on the usual summons having been obtained and served on the prosecutor of the action, or his solicitor, calling on the prosecutor to show cause why the defendant should not have further time to plead; the application may, however, be only granted on such terms as to pleading issuably and taking short notice of trial as the judge in his discretion may direct (c).

The defendant must plead or demur (d) to all the suggestions contained in the writ, within the time allowed by the practice of the Court, or granted on application for that purpose; and it would seem that, in consonance with the former practice, neither the Master of the Rolls nor the judges of the superior Courts have power to strike out any of the suggestions contained in the declaration, as it would then vary from the writ the tenor of which it purports to set out; nor for that reason can a *nolle prosequi* be entered as to any of the suggestions (e). Indeed it is questionable, according to the case of *Blake v. Dodemead and Wife* (f), whether there is a declaration on a *scire facias*, the plea

virtue of this Act, may be transacted, done, or performed by such judge; subject nevertheless and according to the provisions of this Act, and the laws, rules, and regulations for the time being in force for the regulation of the said Court, and the practice and proceedings thereof."

(y) Hind. on Pat. 395.

(z) See New Orders in Chancery, No. 19, *post*, Append.

(a) Hind. on Pat. 396, 397; *Hunt v. Coffin*, Dyer, 197 b; 37 Hen. VI. 14 A; Bro. Abr. tit. Scire Facias, pl. 131—138.

(b) 12 & 13 Vict. c. 109, s. 39; *ante*, p. 258, n. (x).

(c) *Rex v. Nickels*, Hind. on Pat. 396.

(d) If the matter alleged be not sufficient to repeal the patent, the defendant may demur to the *scire facias*. *Sir Oliver Butler's case*, 3 Lev. 221; 2 Tidd, Pr. 8th ed. 1144; Com. Dig. tit. Patent, F, 8.

(e) *Rex v. Newall*, Hind. on Pat. 396.

(f) 2 Stra. 776. "There is no such thing as a declaration on a *scire facias*; the plea is to the writ, and

being to the writ, and the declaration and writ being synonymous. The Attorney-General, however, subject to an application to the Lord Chancellor, or to one of the judges of the superior Courts (g), may direct a *nolle prosequi* to be entered to any suggestion in the writ upon which the defendant could not take any material issue either in law or in fact. If the prosecutor of the action should be desirous of getting rid of any of the suggestions in the writ he may enter a *nolle prosequi*, as to them, at the time of declaring or at any time afterwards (h).

The defendant may demur to the whole, or to any part, of the suggestions contained in the writ, alleging that the matters contained therein, or some particular suggestions, are insufficient in law to cause the patent to be cancelled or vacated, to which the prosecutor, as in ordinary cases, must add a joinder in issue (i).

or plead in
abatement.

The defendant may plead either in abatement (k) or in bar to the writ (l); but if the writ is in other respects sufficient, it will not abate for immaterial surplusage (m).

If the defendant should plead in abatement, it seems that the plea ought to be verified by affidavit, as required by the 11th sect. of 4 Anne, c. 16.

Cannot
plead
double.

If the defendant should plead in bar to the action, he cannot plead double to any part of the writ, as the Crown is not bound by the 4th sect. of the statute 4 Anne, c. 16, not being named in it (n).

And it would seem, that if the defendant should plead double to any of the suggestions in the writ, the prosecutor need only

narratio and *breve* in this case are the same."

(g) 12 & 13 Vict. c. 109, s. 39.

(h) Hind. on Pat. 397.

(i) Stephens on Pl. 4th ed. 65; and see *Res v. Butler*, 3 Lev. 220. Where judgment is given in Chancery upon a demurrer, in a case depending in the Petty Bag office, the writ of error for errors in law lies direct from the Court of Chancery to the House of Lords (*Res v. Edmund Bassett*, 2 H. IV., 3 Rot. Parl. 461, 462, 463; and see authorities quoted in note (a) to *Smith v. Upton*, 6 M. & Gr. 257). But to revoke the judgment for errors in process, or errors in fact, the writ of error lies in B. R. as error *coram nobis*

lies in B. R. for errors in process or of fact occurring in judgments given in B. R.; and that Court and the Court of Chancery are for this purpose considered as "one and the same place." M. 10, E. III. fol. 59, pl. 62; note (a) to *Smith v. Upton*, 6 M. & Gr. 257.

(k) *Res v. Hare and another*, 1 Stra. 146; ante, p. 252.

(l) 2 Tidd, Pr. 8th ed. 1144.

(m) *The Prince's case*, 8 Co. R. fol. 26 b.

(n) Hind. on Pat. 400; *The Attorney-General v. Allgood*, Parker, pp. 1, 15; *Res v. The Archbishop of York*, Willes, 533; S. C., Barnes, 353.

reply to the first plea, and treat the other as surplusage (o), or obtain a summons calling upon the defendant to show cause why the pleas should not be set aside for irregularity. In *The Queen v. Nickels* (p), where the defendant pleaded several matters to a *scire facias*, the Master of the Rolls made an order for setting aside the pleas for irregularity with costs.

The defendant may plead any matter in bar to the several suggestions contained in the writ, the usual and better course being to plead to each suggestion separately.

The defendant's pleas and demurrers, since the 11 & 12 Vict. c. 94, s. 21, re-enacted by 12 & 13 Vict. c. 109, s. 24, came into operation, may be prepared by the defendant or his solicitor (q), who is an attorney of the common-law side of the Court of Chancery, and must be delivered by the defendant or his attorney to the prosecutor or his attorney (r).

Pleas must be delivered, not filed.

Special pleas and demurrers, as in other actions, require to be signed by counsel.

The prosecutor may, of course, demur to any of the defendant's pleas, if they are insufficient in law; and it would seem that he need not demur specially, except perhaps for duplicity, as the provisions of the statutes, 27 Eliz. c. 5, and 4 Anne, c. 16, s. 1, respecting demurrers, do not apply to actions at the suit of her Majesty (s).

As the pleas generally simply traverse the various suggestions of the writ, the common joinder in issue is usually the only replication required.

The prosecutor's demurrer or replication, in the same manner as the defendant's, may be prepared either by himself or his solicitor, and must be delivered to the defendant or his solicitor, as required by the 31 sect. of the 12 & 13 Vict. c. 109 (t).

(o) *Chitty v. Dendy*, 3 Ad. & El. 319.

(p) *Hind. on Pat.* 400.

(q) 12 & 13 Vict. c. 109, s. 24; and see *ante*, p. 248.

(r) 12 & 13 Vict. c. 109, s. 31.

The following is the section in *extenso*:—"And be it enacted, That in any such action, suit, or proceeding as aforesaid, no demurrer, nor any plea or pleading subsequent to the declaration or traverse shall be filed in the said office of the Petty Bag, or otherwise in the said Court of Chancery;

and that in every such action, suit, or proceeding, every such demurrer, plea, and subsequent pleading shall be delivered by the party demurring or pleading, or his attorney, to the opposite party, or his attorney, and that the issue in any such action, suit, or proceeding shall be delivered only, and not filed, and shall or may be made up and delivered by either party, or his attorney, to the opposite party, or his attorney."

(s) *Hind. on Pat.* 401.

(t) See *ante*, n. (r).

Issue.

The issue may be made up and delivered by either party or his attorney, to the opposite party or his attorney (u).

The record.

The record must be made up and filed in the office of the Petty Bag (x). If the issues to be tried are joinders in demurrer, formerly the trial might take place in the Court of Chancery (y). Or if there were a demurrer to part, and issue on facts as to the residue, the demurrer might be determined in Chancery (z), a transcript of the record containing the issue in fact, being sent into the Court of Queen's Bench to be tried (a). But now issues in law are to be tried in one of the superior Courts, a transcript of the record being sent there for that purpose; and issues in fact may be tried in any one of the superior Courts, either at bar or at *nisi prius*, as such Court shall think fit (b); or a transcript of the whole record may be so sent into one of the superior Courts (c). Formerly, the practice was, if there were a demurrer to part and an issue on the residue, for the Chancellor to deliver, *propria manu*, a transcript of the whole record to the Court of Queen's Bench, and judgment was given there, upon the demurrer as well as upon the issue (d); but the present course is to deliver it by the clerk of the Petty Bag; for what is done by his

Issue may be tried in any one of the superior courts.

(u) See s. 31, 12 & 13 Vict. c. 109; *ante*, p. 261, n. (r). Formerly, when there were issues both of law and fact in the Petty Bag office, the whole record was sent into B. R. for determination, as there could not be a judgment of the Chancellor upon one part of the record and a judgment of B. R. upon another part of the same record (see n. (a) to *Smith v. Upton*, 6 M. & Gr. 258). The stat. 12 & 13 Vict. c. 109, now, however, directs the issue to be sent, in all cases, into one of the superior Courts of common law, the name of which is endorsed on the writ.

(x) 12 & 13 Vict. c. 109, s. 33.

(y) *Blakeston's case*, W. Jon. 83; 4 Inst. 80; *Sir Oliver Butler's case*, 2 Ventr. 344; 3 Lev. 220.

(z) *Jefferson v. Dawson*, 1 Sid. 437; S. C. 1 Lev. 283.

(a) 12 & 13 Vict. c. 109, s. 33. The section is as follows:—"And be it enacted, That in case any issue or issues in law, or issues both in fact and

law, shall be joined in any action, suit, or proceeding on the common-law side of the Court of Chancery, then and in such case, the record of such issue or issues shall be made up and filed in the office of the Petty Bag, and a transcript of the said record shall or may thereupon be sent or taken into any one of the three Courts of Queen's Bench, Common Pleas, or Exchequer, and such Court shall, upon the transcript being brought into any such Court, proceed to hear and determine the same in like manner as issues in law or issues in law and fact, from the common-law side of the said Court of Chancery have heretofore been heard and determined in the Court of Queen's Bench."

(b) 12 & 13 Vict. c. 109, s. 32.

(c) *Jefferson v. Dawson*, 1 Lev. 283; 1 Eq. Ca. Abr. 128; 2 Tidd's Pr. 8th ed. 1144.

(d) 1 Latch, 3; 1 Eq. Ca. Abr. 128; *Bynner v. The Queen, in error*, 9 Q. B. 523.

officer may be said to be done with the proper hand of the Chancellor(e); and, as has been stated, a transcript of the record containing the issues, both in law and in fact, may now be sent or taken into any one of the three Courts of Queen's Bench, Common Pleas, or Exchequer of Pleas, and a writ of *venire facias juratores* shall issue, to be made returnable in whichever Court it is intended that the issue shall be tried(f).

And it would seem, though not expressly so directed by the statute, that, as the writ of *scire facias* may now be sent to the sheriff of any county, although the record upon which it is

(e) *Rex v. The Warden of the Fleet*, 1 Eq. Ca. Abr. 128, 129; 2 Wms. Saund. 6th ed. 6, n. (1); 2 Tidd, Pr. 8th ed. 1144.

(f) 12 & 13 Vict. c. 109, s. 32. The following is the section:—"And be it enacted, that in case any issue respecting any matter of fact to be tried by the country has at any time heretofore been, or shall at any time hereafter be, joined in any action, suit, or proceeding, on the common-law side of the Court of Chancery, then and in every such case the record shall be made up and filed in the office of the Petty Bag; and it shall and may be lawful to try such issue in fact in any one of the three Courts of Queen's Bench, Common Pleas, or Exchequer of Pleas; and in every such case the writ of *venire facias juratores*, for summoning a jury to try such issue, shall or may be made returnable and returned in such of the said three Courts as the issue is intended to be tried in; and a transcript of the said record in Chancery, containing such issue, shall or may thereupon be sent or taken into the Court in which such writ of *venire facias* shall be made returnable, in like manner as records containing issues may now be sent or taken from the common-law side of the said Court of Chancery into the Court of Queen's Bench; and it shall not be necessary to issue any writ of *mittimus*, or other

writ, for the sending or taking such transcript into either of the said Courts; and in case such writ of *venire facias* shall be made returnable in either of the said Courts of Common Pleas or Exchequer of Pleas, such Court shall, upon the transcript of the said record being brought into such Court, proceed to try such issue at bar or at *nisi prius*, as such Court shall think fit, and in like manner as such issue would or might have been tried in the Court of Queen's Bench in case such writ of *venire facias* had been made returnable in that Court, and the said transcript, or the original record, had been taken, or deemed to be taken, by the Lord Chancellor into that Court; and upon any such transcript as aforesaid being taken or brought into either of the said Courts of Common Pleas or Exchequer of Pleas, such Court shall or may issue such writs, make such rules, and proceed therein, in all respects for the trial or other lawful determination of the issue therein contained, in like manner as the Court of Queen's Bench could or might have done if such transcript or the original record had been taken into the Court of Queen's Bench, and with full power to set aside or vacate any trial, verdict, or other proceeding, in like manner as could or might have been done by the said Court of Queen's Bench."

founded is in Middlesex (*g*), the writ of *venire facias juratores* for trying the issue, may now also be directed to the sheriff of any county, as the trial may be had at *nisi prius* (*h*).

The *venire facias* issued out of Chancery does not state the issues to be tried by the jury, but merely that the jury are to take cognizance upon their oaths, in a plea of *scire facias* between the Queen and the defendant (*i*).

Notice of trial.

The prosecutor's attorney will now, under the statute 12 & 13 Vict. c. 109, s. 24 (*k*), give notice of trial to the opposite party according to the practice of the Court in which the issue is to be tried.

Delivery of transcript of the Chancery record.

After notice of trial has been given, and an entry has been made upon the record in the Court of Chancery, of an award of a writ of *venire facias juratores*, a day is to be given to the parties to be in the Court in which the *venire facias* is made returnable (which is always the return day of the writ), and the clerk of the Petty Bag then makes a transcript of the Chancery record on parchment, and delivers it to the prosecutor's solicitor, to be carried into the Court in which the issues are intended to be tried (*l*). The transcript must have annexed to it a copy of the notice of objections delivered by the prosecutor to the defendant. From this transcript the *nisi prius* record is prepared by the prosecutor's solicitor (*m*).

Formerly, in the Queen's Bench, when the transcript of the record was brought into that Court, a record was made of the

(*g*) 12 & 13 Vict. c. 109, s. 29; see *ante*, p. 254.

(*h*) *Ib.* s. 32; see *ante*, p. 263, n. (*f*).

(*i*) *Strury v. Strury*, 2 Rol. Rep. 291; Hind. on Pat. 404.

(*k*) Sect. 24; see *ante*, p. 248.

(*l*) Hind. on Pat. 405; 12 & 13 Vict. c. 109, s. 32; *ante*, p. 263, n. (*f*).

(*m*) See the General Rules and Orders, *post*, Append., regulating the practice of the office of the Petty Bag, made under the authority of the 41st sect. of the stat. 12 & 13 Vict. c. 109. That section is as follows:—"And be it enacted, that it shall be lawful for the Lord Chancellor, with the advice and assistance of the Master of the Rolls, from time to time hereafter, to make such alterations, orders, rules and regulations as he shall, with such ad-

vice and assistance as aforesaid, think fit, in and respecting the said office of the Petty Bag, and the business and practice thereof, the duties of the said clerk, and the transaction, management, and conduct of the business thereof, and also in and respecting the modes of suing out, preparing, ingrossing, issuing, sealing, signing, serving, executing, and returning writs, process, rules, notices, and other instruments issuing out of or authorized or required by the said Court or the practice thereof; and also from time to time to rescind, alter, or vary such alterations orders, rules, and regulations: Provided always, that no such alterations, orders, rules, or regulations as aforesaid, shall be contrary to, or inconsistent with the provisions of this Act."

bringing of it into Court, setting out the whole of it *verbatim*; and upon this record all the proceedings in that Court were entered immediately following the transcript of the Chancery record and commencing with the appearance of the respective parties in that Court (*). Now, by the 34th section of the 12 & 13 Vict. c. 109, it is enacted, "That the said Courts of Queen's Bench, Common Pleas, and Exchequer, and the judges thereof respectively, shall have the same power and authority in respect of the transcript of any record brought before them as aforesaid, and the pleadings, issues, and matters therein contained, as they have in respect of the record in any action, suit, or proceeding, commenced or pending in such Court, and the pleadings, issues, and matters in such record contained: Provided always, that nothing herein contained shall authorize the giving final judgment in any case in which the Court of Queen's Bench has not heretofore had such authority.

Power of the
superior
Courts to
try the
issues.

The return of the writ of *venire facias* is recorded immediately after the entry of the appearance of the parties. If not returned, an entry is made accordingly, upon which an *alias venire* may be awarded. In the Court of Queen's Bench, this *alias* writ issues out of that Court and not out of Chancery (o), and having been prepared by the prosecutor's attorney is signed and sealed at the Crown office. It follows the form of the prior writ, and is tested in the name of the Chief Justice (p). The sheriff's return is then procured in the usual way.

The action may be tried, either at bar, or at *nisi prius*, as the Court into which the transcript of the record is brought shall think fit (q).

May be tried
either at bar
or nisi prius.

It is doubtful, however, whether the warrant of the Attorney-General for the action of *scire facias* to be tried at *nisi prius*, will not be still required, notwithstanding the 32nd sect. of the statute of 12 & 13 Vict. c. 109, which gives this power to the Court to try the issue at bar or *nisi prius*: for it has been held, that the Crown is not bound by the writ of *nisi prius* when issued, without such warrant; the Statute of Westminster the Second, which gives the writ of *nisi prius*, not being binding upon the Crown, the Crown not being expressly named in it (r), and before this

(*) Hind. on Pat. 406.

ante, p. 263 n. (f).

(o) Staun. Prerog. 77 b; Jenk. 3rd Century, p. 133, ca. 71; Hind. on Pat. 406.

(r) Hawk. book ii. ch. xlii.; Bro. Abr. Nisi Prius, pl. 35; and see F. N. B. 241, A; Fitz. Abr. Nisi Prius, pl. 16; Sav. 2; Vin. Abr. P. b

(p) Hind. on Pat. *ib.*

(q) 12 & 13 Vict. c. 109, s. 32; see

2; Rol. Abr. 629, 1, 10; Staun. 156;

statute it seems that if an action of *scire facias* were to be tried at *nisi prius*, without any writ from the Crown or warrant from the Attorney-General, the whole proceeding would be irregular (a).

Trial by
proviso.

The action cannot be taken down to trial at *nisi prius* by *proviso*, without the consent of the Attorney-General, as no *laches* can be attributed to the Queen; and a trial at *nisi prius* by *proviso*, without such consent, would be irregular and would be set aside (t).

The writ of *distringas juratores* must be framed by the prosecutor's attorney, in accordance with the practice of the Court out of which it issues, and must be tested in the name of the Chief Justice of the Court, as of the day of the return of the *venire facias juratores*. Formerly, this writ, when issued out of the Queen's Bench, was directed to the sheriff of Middlesex, and was made returnable on a day certain in the next ensuing term before the Queen at Westminster (u).

The *nisi prius* record.

The *nisi prius* record must be prepared by the prosecutor's attorney in the ordinary way, and is a mere transcript of the record sent into the superior Court. Formerly, the venue was necessarily laid in Middlesex, because the record upon which the *scire facias* was founded remained in the county of Middlesex, and therefore the issues must be tried by a jury of that county (x); but as the *scire facias* itself, to which the same reason applied, may now be directed to the sheriff of *any county* (y), it would seem that, according to the spirit of the statute 12 & 13 Vict. c. 109, s. 29, the venue of the *nisi prius* record may be laid in any county.

Venue.

Practice.

If the transcript of the record have been sent out of the Court of Chancery into the Queen's Bench (and since the statute 12 & 13 Vict. c. 109, s. 32, the practice in the Common Pleas and Exchequer will be similar) (z), the *nisi prius* record (having been

Hind. on Pat. 407. "Albeit this Act (Stat. West. 2, c. 30) be general, yet a *nisi prius* shall not be graunted where the King is party, or where the matter toucheth the right of the King, without a speciall warrant from the King, or the assent of the King's attorney." 2 Inst. 424.

(a) Hind. on Pat. 408.

(t) 2 Hawk. c. 41, s. 10. "It seems agreed, that neither in actions wherein the King is sole party, nor in indictments, there can be any process taken out by proviso, because no laches

are imputable to the King." And see 2 Leon. 110; *The Queen v. Sir J. Banks*, 2 Salk. 652; S. C., 2 Ld. Raym. 1082; S. C., 6 Mod. 246, 247; 1 Keb. 195; 1 Sid. 316; 11 Mod. 33; *Rex v. Dyde and another*, 7 T. R. 661; *Rex v. Macleod*, 2 East, 202.

(u) Hind. on Pat. 408; see now sect. 27 of 12 & 13 Vict. c. 109; *ante*, p. 255.

(x) Bro. Abr. *Scire Facias*, pl. 189.

(y) 12 & 13 Vict. c. 109, s. 29; see *ante*, p. 254.

(z) By the 48th sect. of 12 & 13

prepared by the prosecutor's attorney, and the Attorney-General's warrant for a trial at *nisi prius* obtained) must be taken to the Queen's Bench office to be sealed and passed. A copy of the notice of objections required by the statute 5 & 6 Will. IV. c. 83, and the Attorney-General's warrant for the *nisi prius* writ, must be then annexed to the record, together with the writs of *venire facias* and *distringas*, and the sheriff's returns to those writs (if the cause is to be tried by a common jury); and the record is then carried into the Marshal's office (a).

Either the prosecutor or defendant may obtain a rule to have the action tried by a special jury (b). In the Queen's Bench this is drawn up at the Crown office, upon production of a motion paper signed by counsel (c), and an appointment is made there to nominate the jury. The rule and the appointment are then to be served on the opposite party and on the sheriff; and on the production of the rule at the Chief Justice's chambers, on or before the day preceding the adjournment day, in London or Middlesex, the cause is marked for a special jury (d). If the cause be triable at the assizes, it will be marked a special jury, without producing or seeing the return of the jury process (e). When only a single appointment has been served, after waiting half an hour, there must be another peremptory appointment. If the adverse party does not then appear, the party who procured it, after waiting one hour, may proceed with the nomination *ex parte*. When both parties attend, or when one party is entitled to proceed *ex parte*, the jury is nominated in the Crown office, the clerk there making an original list of the names of the jurors, drawing a number by ballot from the box, and referring to the book for the name set against such number, until forty-eight names are nominated. Each party then makes a copy of the list, and the party moving

Trial by
special jury.

Vict. c. 109, it is enacted, "That every of her Majesty's Courts of common law, and all other Courts, judges, officers, and others, shall take cognizance of all and every of the writs and proceedings so brought before them as aforesaid, and give effect thereto in such manner as may be requisite, and, if necessary, the judges of such Courts respectively shall and they are hereby required to make such rules and regulations, for the practice of their respective Courts thereupon, as to them respectively shall seem fitting, which

shall be signed by the judge, or by the major part in number of the judges of the said Courts respectively, and if there be more than one judge of any such Court the chief judge of such Courts (if there be a chief judge) shall be one."

(a) Hind. on Pat. 409.

(b) See 6 Geo. IV. c. 50, s. 30.

(c) See Corner's Cr. Pr. 137.

(d) Reg. Gen. Hil. 44 Geo. III.; and Corner's Cr. Pr. 137.

(e) Corner's Cr. Pr. ib.

for the jury pays the sheriff two guineas, and one guinea to the Master. An appointment may then, or at any time after, be had, to reduce the list to twenty-four, in the same manner and form as above stated for the nomination. The parties meet at the Crown office, and the list is reduced by the attorneys for the prosecutor and defendant alternately striking out a name, until twelve have been struck out by each party. Before reducing *ex parte*, there must be an affidavit of service of the rule and appointments to nominate and reduce, on the proper parties. The Master strikes out for the party who does not attend (*f*).

The twenty-four names which remain in the reduced list are those of the jurors who must be summoned to try the issues joined in the action (*g*); and the cause cannot be tried by any other jury, unless the rule for the special jury be first discharged (*h*). The reduced list must be signed by the Master, and annexed to the *venire facias* and taken to the sheriff. When a day has been appointed for the trial, the sheriff will summon the jurors, and copy the names into a panel, and return the writ with the panel annexed into Court on the day appointed.

When a party obtains a rule for a special jury, and does not proceed to nominate it, the other party may obtain an office copy of the rule, and proceed, if he think fit, to nominate it, as if it were his own rule: or a summons may be taken out, calling on the party who obtained the rule to show cause why the cause should not be tried by a common jury (*i*).

If the defendant procures a rule for a special jury for the purpose of delay, and does not proceed to strike and reduce the jury, the prosecutor may move to discharge the rule (*k*); or he may disregard it, and proceed to try the action by a common jury (*l*).

Praying a
tales.

The Queen, being a party to the action, a *tales* cannot be

(*f*) Corner's Cr. Pr. 137, 138; *Rex v. — Hart, Esq.*, Cowp. 412.

(*g*) 6 Geo. IV. c. 50, s. 30; "An Act for consolidating and amending the Laws relative to Jurors and Juries." By this sect. the three superior Courts of Westminster, on motion made by the prosecutor or defendant, are authorized to order and appoint a special jury to be struck by the proper officer of each respective Court; which jury, so struck, shall be the jury returned for the trial of such issue.

If a new trial be granted a fresh jury is always struck.

(*h*) *Rex v. Perry*, 5 T. R. 453.

(*i*) Corner's Cr. Pr. p. 138; *Rex v. Smith and others*, *ib*.

(*k*) *Stanbury v. Gillet*, 9 Bing. 319; *Phelps v. Kelly*, 3 M. & G. 883; *Chuck v. Harris*, 1 M. & G. 940; *Anon*, 1 Chitty, 490, n.; Hind. on Pat. 411.

(*l*) 1 Stark. R. 31; *Gunn v. Honeyman*, 2 B. & Ald. 490; *Johnson v. Blackwell*, 6 C. & P. 236.

prayed at the trial without the Attorney-General's warrant (m). To provide, therefore, for the contingency of there not being twelve special jurymen present, each party ought to provide himself with such a warrant, which is granted, as of course (n).

The action being nominally at the suit of the Crown, it appears to be necessary to make a proclamation at the trial as soon as the jury appears, as the prosecutor not being named in the record, the Court cannot have any judicial knowledge on the subject. The counsel for the prosecution then appears for the Crown, and the jury is sworn (o).

Proclamation at the trial.

The same rules, as to the opening of the case by the counsel for the prosecution and as to the right of reply on evidence called for the defence, apply in this as in any other ordinary civil action.

The Queen however being a party, the defendant cannot demur to the evidence for the Crown, except by consent of the counsel for the Crown; if that be refused, the Court ought to direct the jury to find the special matter upon which the law may afterwards be adjudged (p).

Demurrer to evidence.

Considerable doubt appears to prevail in the older authorities (though the reasons for the doubt are not very satisfactory) whether a bill of exceptions can be allowed in any case where the Queen is a party, the Crown not being expressly named in the Statute of Westminster the Second (q), which gives the bill of exceptions (r). But in a *scire facias*, which came before Lord Keeper Harcourt in 1711, to whose judgment on a frivolous plea in abatement a bill of exceptions was tendered, his Lordship consulted the judges whether a bill of exceptions could lie in such a case; and the judges were all of opinion that a bill of exceptions did lie upon proceedings in the Court of Chancery in a suit depending in the Petty Bag, "because the mischief is the same in case of an erroneous judgment in the Court of Chancery as in any other Court (s).

Bill of exceptions.

(m) 2 Hawk. c. 41, s. 18; *Verni v.* —, 1 Lev. 223.

(n) Hind. on Pat. 411.

(o) 9 Co. 101 a; Hind. on Pat. 412.

(p) *Baker's case*, 5 Co. 104 a; *Middleton v. Baker*, Cro. Eliz. 752; Co. Litt. 72. a.; *Fitzharris v. Boies*, 1 Lev. 87; Doct. Plac. 119.

(q) 13 Edw. I. c. 31.

(r) See *ante*, book ii. ch. vii. "Bill of Exceptions," p. 209; and see 2 Hawk. c. 46, s. 20; *Rex v. Vane*, 1 Sid. 85;

Kel. 15; 1 Keb. 32; 1 Lev. 68, S. C. "A bill of exceptions does not lie in criminal cases, but only in actions between party and party." *Rex v. Archbishop of York*, Willes, 535; 2 Inst. 427.

(s) Mr. Hindmarch, in his book on Patents (p. 413), has given a copy of the correspondence which then took place between the Lord Keeper and the Lord Chief Justice, the original of which is preserved in the office of the

Verdict.

Each suggestion in the writ of *scire facias* ought to show sufficient cause for repealing and cancelling the patent, and a verdict

Petty Bag. As it well illustrates some observations made in the chapter on the Bill of Exceptions (*ante*, p. 209), it is here copied.

"The Lord Keeper's Letter to the
Lord Chief Justice.

"MY LORD,

"On Thursday last Mr. Attorney-General moved the Court of Chancery to discharge a frivolous plea, in abatement to a *scire facias* depending in the Petty Bag. On hearing counsel on both sides, I was of opinion that the plea was frivolous, and ordered it to be discharged. The defendant's counsel, immediately upon my pronouncing the order, produced a bill of exceptions ready engrossed, in ten large skins of parchment, and desired me to seal it. I forbear to trouble your lordship with any account with respect to the nature of the writ, or of the plea, or the manner of tendering the bill to me.

"The length of the bill made it necessary for me to take time to examine the truth of it; but, on further consideration, I am under some doubt whether a bill of exceptions lies from a judgment given by the Court of Chancery in a suit depending in the Petty Bag.

"The mischief, in my apprehension, is the same as in the case of an erroneous judgment in any other Court of record, and yet, since I have not met with any precedent of tendering a bill of exceptions to the Court of Chancery, and forasmuch as the remedy for obliging the justices to set their seals seems very improper to be taken in the case of the Keeper of the Great Seal, I intreat the favour of your lordship, if your lordship conceives there is any doubt in this case, to take the opinions of all the judges, and to

give yourself the trouble of certifying their opinions to me.

"I am, my lord,

"Your lordship's

"Very humble servant,

"HAMCOURT.

"17th Nov. 1711."

"The Answer of the Lord Chief
Justice.

"MY LORD,

"I have desired the opinion of my Lord Chief Justice of the Common Pleas, my Lord Chief Baron, and the rest of the judges, upon the question proposed by your lordship in your letter to me of the 17th of November last:—

"Whether a bill of exceptions lies upon proceedings in the Court of Chancery in a suit depending in the Petty Bag?"

"After having met and heard counsel on both sides, and conferred together, we all take the point to be entirely new, for neither any of our own experience or reading, nor the industry of the parties or their counsel, have furnished us with any one instance of a bill of exceptions in Chancery before this, which occasions the present question. But yet, from the nature of the Act of Parliament, whereby the bill of exceptions is given, which is an advancement of justice, the extensive words which are used in it, and the more extensive expositions which from time to time have carried it beyond the strict words, to cases and Courts within the same mischief; and because the mischief is the same in case of an erroneous judgment in the Court of Chancery as in any other Court, which your lordship, in proposing this question, is pleased to intimate as of great weight with yourself; we are all of opinion that a bill of ex-

on any one of the issues joined on the suggestions will entitle the Crown to judgment. The other issues then become immaterial, and the judge may discharge the jury from giving any verdict upon them (t).

As the Crown is not particularly named in the statutes 7 & 8 Will. III. c. 82, s. 1, and 6 Geo. IV. c. 50, s. 16, which give the *venire de novo* in ordinary actions, it seems therefore that a new writ of *venire facias* cannot be issued in an action of *scire facias* to which the Queen is a party (u).

But the Court has power to grant a new trial whether the action has been tried at bar or at *nisi prius*, as, until the issues have been properly tried, the Court cannot give judgment thereon (x).

When the issues have been tried, and the jury have returned their verdict, the Court in which such issues have been tried or determined shall proceed to give judgment thereon and execute such judgment (y), and a transcript of such judgment, and of the proceedings of the Court upon such issues, is to be taken into the Court of Chancery, to the end that judgment may be given, or such other proceedings may be had in Chancery as are according to the law and custom of England (z); and no writ of *mittimus* or

ceptions doth lye upon proceedings in the Court of Chancery in a suit depending in the Petty Bag. I could not lay this sooner before your lordship, having not had the final resolution of the judges till last night, when we all met together for that purpose.

"23rd Jan. 1712."

(t) *Res v. Johnson*, 5 Ad. & E. 488, 512; *Cook v. Caldecot*, 4 C. & P. 315; *Tolson v. Kaye*, 6 M. & Gr. 589; *Duckworth v. Harrison*, 4 M. & W. 444; *Powell v. Sonnett*, 1 D. N. S. 56; 1 Bligh, N. S. 545; 3 Bing. 381; 11 Moore, 330, S. C.; *The Queen v. Nickels*, cited in Hind. on Pat. 414. "An objection was taken by the prosecutor's counsel to the sufficiency of the specification, and as the objection arose upon the face of the specification, and respecting the construction to be put upon the words of the instrument, Lord Denman, C. J., directed the jury to find a verdict for the Crown, upon the issue respecting the sufficiency of

the specification, and discharged them from giving any verdict upon the other issues in the action."

(u) *Prelious v. Robinson*, 2 Vent. 173.

(x) 12 & 13 Vict. c. 109, s. 35, *post*, n. (y); *Res v. Bewdley*, 1 P. Wms. 207; *Res v. Arkwright*, Dav. Pat. Ca. 141; *Res v. Wheeler*, 2 B. & Ald. 345; *Res v. Bynner*, 9 Q. B. 529.

(y) 12 & 13 Vict. c. 109, s. 35. The sect. is as follows:—"And be it enacted, That upon the trial or determination of any such issue or issues as aforesaid, had or completed in any action, suit, or proceeding from the common-law side of the Court of Chancery, the Court in which such issue or issues shall be so tried or determined shall proceed to give judgment thereon, and execute such judgment in like manner as could or might have been done by the Court of Queen's Bench before the passing of the said recited Act, or of this Act."

(z) See note (a) to *Smith v. Upton*, 6 M. & Gr. 256. "After the record is

other writ is necessary for the purpose of remanding or taking a transcript of the proceedings in the superior Courts into the Court of Chancery (a).

The clerk of the Petty Bag, upon receiving the return of the transcript of the verdict of the jury, and proceedings or judgment of the Court of common law, upon any issue in law or in fact, files the same in the Petty Bag office, and causes an entry to be made of such verdict and proceedings or judgment, and such transcript is then annexed to the original record in the Petty Bag office; and thereupon the judgment of the Court of common law is entered on or annexed to the same record, in conformity with the judgment of the Court from which the transcript is returned (b).

The judgment to cancel the letters patent.

If the prosecutor has obtained a verdict on any issue which invalidates the letters patent the judgment entered is, "That the said letters patent, of our said Lady the Queen, so as aforesaid granted to the said ———, be revoked, cancelled, vacated, disallowed, annulled, void, and invalid, and be altogether had and held for nothing, and that those letters patent be restored into the Chancery of our said Lady the Queen, here, to be cancelled; and also, that the enrolment thereof be cancelled, quashed, and annulled" (c).

removed for the purpose of trial, it commonly remains in B. R. until final judgment is given; coming back into Chancery only for the purpose of execution, by cancelling the record upon which the *scire facias* issued, when judgment is given for the Crown." And see *post*, note (c); *Bynner v. The Queen*, 9 Q. B. 526.

(a) 12 & 13 Vict. c. 109, s. 36. "And be it enacted, that upon the trial or determination of any issue or issues by the said superior Courts of common law, or upon any rule or order being made, or judgment given in any action, suit, or proceeding, in which the transcript of the record shall be brought before them as aforesaid, a transcript of such judgment, rule, or order, and of the proceedings of the Court of common law upon such issue or issues, may be taken into the said Court of Chancery, to the end that judgment may be

given, or such other proceeding had in Chancery, according to the law and custom of England; and no writ of *mittimus*, or other writ, shall be necessary for the purpose of remanding or taking a transcript of the proceedings in the superior Courts of common law into the said Court of Chancery."

(b) New Orders in Chancery, 1849, No. 8; see *post*, Append.

(c) 4 Inst. 88; *Bynner v. The Queen*, in error, 9 Q. B. 526; Tidd's Pr. 8th ed. 1145; Hind. on Pat. 423; Dyer, 197 b; 2 Wms. Saund. 6th ed. 72, n. Formerly there existed considerable doubt, and the authorities were conflicting, whether when issues in a *scire facias* to repeal letters patent were sent out of Chancery into the Queen's Bench to be tried, the Court of Queen's Bench could give the above judgment to cancel the letters patent, the original record being in the Court

If the defendant have obtained a verdict upon every issue, then he will of course be entitled to judgment, and the form of it to be entered on the Chancery Record will be, "It is considered and adjudged by the same Court here, that he the said ———, do depart hence without day in this behalf" (e).

On this judgment being recorded, the party entitled to judgment may sign it in the Petty Bag office.

If the verdict be against the defendant, he may, if he have sufficient grounds, move in the Court of Chancery, before the Lord Chancellor in arrest of judgment; and in like manner, if the verdict be against the prosecutor, he may move for judgment, *non obstante veredicto*. In either case, the party intending so to move, ought to apply to the Master of the Rolls, to stay the entry of the judgment until he has had opportunity to make the motion (f).

If the judgment be for the Crown, it may be pleaded in bar to

of Chancery, where only it could be cancelled by the Lord Chancellor, it being, according to Sir Ed. Coke (4 Inst. 88), "the highest point of his jurisdiction to cancel the King's letters patents under the great seal, and damning the enrolment thereof by drawing strikes through it like a lettice." (See the cases collected in Hind. on Pat. 415, *et seq.*). The question was at length solemnly argued recently (1846) on error, in the Exchequer Chamber in the case of *Bynner v. The Queen* (9 Q. B. 523), in which case, at the trial in the Queen's Bench, the above judgment was given, the errors assigned being that that Court had no authority to pronounce such judgment, which belonged only to the office of the Lord High Chancellor. In that case the judgment of the Court below was affirmed, Lord Chief Justice Tindal, in delivering the judgment of the Court, saying, "On the whole, we think the balance of the authorities is decidedly in support of the position contended for on the part of the Crown, viz., that the record is sent down to the Queen's Bench; that the Queen's Bench has authority to award the judgment, and afterwards to trans-

mit either the record or the tenor thereof to the Court of Chancery, in order to be fully carried into execution." And that as to the objection that the letters patent and the enrolment thereof, directed by the judgment to be cancelled, still remained in the Court of Chancery, it was sufficient answer to that objection, "that nothing remains to be done in the Court of Chancery but a mere ministerial act by the officers of that Court;" and that there was "no difficulty in getting an exact transcript of the record of the judgment from the Court of Queen's Bench to the Court of Chancery by *certiorari* and *mittimus*," And now, since the passing of the 12 & 13 Vict. c. 109, ss. 35, 36, the Court where the issue is tried is to proceed to give judgment thereon, and execute such judgment in like manner as could or might have been done by the Court of Queen's Bench before the passing of this Act, which judgment is to be annexed to the record in the Petty Bag office by the New Orders in Chancery.—See *text*.

(e) Hind. on Pat. 424.

(f) *Ibid*.

Motion in
arrest of
judgment.

any subsequent proceedings on the patent, as it has become thereby wholly void (g).

Restoration
of the letters
patent into
Chancery.

In the latter case, a part of the judgment (as has been seen) is that "those Letters Patent be restored into the Chancery to be cancelled." As the letters patent were originally delivered out of Chancery to the patentee, as his evidence of the grant from the Crown, after the entry of the judgment on the Chancery Record, a day is given to the defendant to bring in the patent, of which notice is given to him (h). On the day appointed, the counsel instructed on behalf of the prosecutor, (if the defendant appear and produce the patent,) must move, "that the said letters patent, and the enrolment thereof, may be cancelled and vacated in pursuance of the judgment." If the defendant appear, but do not produce the patent, the prosecutor's counsel then moves, "that the defendant stand committed to prison for his contempt of the Court in not restoring the patent into Chancery, in pursuance of the judgment" (i).

If the defendant has sued out a writ of error, he can show that as cause, by his counsel, why the judgment should not be carried into execution; or, on a sufficient reason assigned, he may ask for further time to bring in the patent, and if the Court think it necessary, any reasonable length of time will be given.

If the defendant can show by his counsel that he has not either the possession or control over his patent, the Court will not construe his neglect to bring it in, to be a contempt; as he cannot be required to do that which is impossible (k); but he may be required to undertake not to assign the patent, bring a writ of error, or do any act to defeat the judgment (k); and a further day may be given him to bring in the patent when he shall be able to do so.

If the defendant do not appear on the day given him, and in pursuance of the notice sent to him, the counsel for the prosecutor must move for a rule or order *nisi*, calling upon the defendant to show cause why an attachment should not be issued against him for contempt (l).

If the patent belong to a corporation, a *distringas* is, it seems,

(g) Bro. Abr. Pat. pl. 23; Scire Facias, pl. 138, 131. case, 2 Q. B. Rep. 619.

(h) See the references to forms, post, Append.

(i) *Rex v. Carey*, 1 Vern. 131; 1 Eq. Ca. Abr. 129, S. C.; *Clarke's*

(k) *Rex v. Newton*. In which case the patent was in the custody of the defendant's *cestui que trust*, who resided abroad. Hind. on Pat. 425.

(l) Hind. on Pat. 425.

the proper process to compel them to bring it in to be cancelled (n).

When the patent is brought in, it is necessary to obtain the order of the Lord Chancellor, that the enrolment be cancelled, and a *vacatur* entered on the roll upon which the patent is enrolled. The enrolment is then cancelled under the direction of the Master of the Rolls, as the keeper of the records of the Court (o); and he signs his name in the margin of the roll opposite the enrolment of the patent which is to be cancelled, which is done "by drawing strikes through it like a lettice" (p). A *vacatur* is then entered on the margin of the roll, as follows:—

"Cancelled this enrolment, by order of the Lord Chancellor, dated the day of , A.D. 18 ; in pursuance of the judgment, ——— v. ———, in the Petty Bag. Therefore on the day of , A.D. 18 , the Letters Patent, and the enrolment thereof, are vacated."

If the defendant obtain a writ of error, *coram nobis in Cancellaria*, for errors in process or errors in fact, to reverse or vacate a judgment for the Crown, all proceedings for cancelling the patent and enrolment will be stayed until judgment shall have been given upon the writ of error (q). When the process issues out of Chancery and is made returnable in any one of the superior Courts, the writ of error must be made returnable in the same Court (r).

For errors in law in the Court of Chancery, the writ of error must be returnable in Parliament (s).

The Queen being a party, it is necessary to obtain the fiat of the Attorney-General, in order to obtain a writ of error: this is always granted, as of course. If the writ of error is to be returnable in Parliament, a warrant must also be procured from the Secretary of State for the Home Department, to authorize the issuing of the writ. The writ must be directed to and allowed by the Master of the Rolls (t). In other respects, the practice as to writs of error in this action, is the same as in other cases (u).

(n) 11 Co. 74 a.

(o) By 12 & 13 Vict. c. 109, s. 40, the Master of the Rolls may make rules and orders for the transfer, care, and custody of the records, enrolments, &c.

(p) 4 Inst. 88.

(q) 42 Ass. fol. 262, pl. 22; Bro. Abr. Error, pl. 131.

(r) 18 Edw. III. fol. 25, pl. 17;

17 Ass. 24; 29 Ass. 47.

(s) Bro. Abr. Error, pl. 95—131; Jurisdic. pl. 53; 37 Hen. VI. 13 & 14; 11 Edw. IV. 9 a; 1 Ro. Abr. 745, (I) 4; *Rex v. Butler*, 2 Vent. 344; 1 Lev. 220; Hind. on Pat. 428.

(t) Hind. on Pat. 429.

(u) See Macqueen's Pr. Ho. Lords, 361, 372.

Costs.

The general rule as to costs in the Courts of common law is, that no costs are either paid or received where the Crown is the prosecutor (*x*); and this rule has been held to apply to a *scire facias* to repeal a patent; the statutes 8 & 9 Will. III. c. 11, s. 3, and 3 & 4 Will. IV. c. 42, s. 34, which give costs in actions of *scire facias*, being held only to apply to civil suits, where there is a plaintiff and defendant.

By the 25th sect. of the 12 & 13 Vict. c. 109, it is enacted, "that every attorney or party practising on the common-law side of the Court of Chancery, shall be entitled to charge and be paid and allowed such costs, fees, and charges, for the transaction of business on the common-law side of the said Court, as is or are allowed to attorneys, or parties, for business of a similar nature in her Majesty's superior courts of common law." And by sect. 37, it is enacted, "that in all cases, where any party shall be entitled to the costs of any such issues, or of any other proceedings or matters provided for by this Act in any of the said Courts, such costs shall be taxed and regulated by one of the Masters of the said Court respectively, who shall indorse his *allocatur* on the rule or order, as the case may be, or upon the *postea*, before the same shall be taken or returned into the Court of Chancery as aforesaid."

Bond to secure costs.

The prosecutor will, of course, have his own costs to pay, according to the scale allowed by the 25th & 37th sects. of the statute above set forth; and as has been already stated (*y*), he is always required to give security by bond to the clerk of the Petty Bag, for the payment of the defendant's costs (*z*); if the defendant should obtain a verdict and judgment in the action. If it should be necessary to sue on the bond, application ought to be made to the Attorney-General to direct the bond to be put in suit; and the Lord Chancellor, or Master of the Rolls, will thereupon grant leave to sue in the name of the clerk of the Petty Bag, for the recovery of the costs, on such terms and conditions as may seem proper (*a*); which are usually, that the defendant should indem-

(*x*) *Rex v. Miles*, 7 T. R. 367; But not in Equity; *Attorney-General v. The Mayor, &c. of London*, 18 L. J., N. S. Chan. 339.

(*y*) See *ante*, p. 250.

(*z*) No 17 of the New Orders in Chancery, 1849, is as follows:—"A bond of indemnity against costs to be incurred in the prosecution of an action of *scire facias*, may (if so desired by the Attorney-General) be taken in the

name of the clerk of the Petty Bag; but the same is not to be deposited or filed in the office of the Petty Bag, unless the intended obligors of the sums for which they are to give security, be named by the Attorney-General."

(*a*) See New Orders in Chancery, 1849, No. 18; which is as follows:—

No. 18. "A bond of indemnity filed or deposited in the Petty Bag office, may, at the request of the Attorney-

nify the clerk against all costs and expenses of the intended proceedings on the bond (b).

The costs of motions and interlocutory proceedings are, however, often granted by the Court (c); and the order of the Court of Chancery may be enforced as a rule of Court under 1 & 2 Vict. c. 110, s. 18 (d).

It may be stated as pertinent to the subject of the chapter, that if the Queen has been led to make any grant illegally and unadvisedly, by the proviso which every patent contains, the grant may be revoked by the Queen, or by any six of her Privy Council, for the causes mentioned in the proviso, such as would render it void as contrary to law (e). Revocation of grant.

It may also be stated, that a *scire facias* to repeal letters patent, does not abate by the demise of the Queen, in whose name it is brought (f). Proceedings do not abate by demise of the crown. The reason assigned is, *because it is process* (g).

For references to forms of proceedings, see Append.

General, be put in suit under such circumstances, and upon such terms and conditions as the Lord Chancellor or the Master of the Rolls may approve of." See *post*, Append.

(b) Hind. on Pat. 430.

(c) *Rex v. Neckels*, Hind. on Pat. 430. Lord Langdale granted the costs of an application, to set aside an irregular plea. *Rex v. Crawford*, *ibid.* Lord Lyndhurst granted the prosecutor his costs of opposing a motion to re-

scind an order of the Master of the Rolls; and *Rex v. Bewdley*, 1 P. Wms. 224; in which the Court of Queen's Bench granted the defendants a new trial on payment of costs.

(d) See *ante*, p. 89.

(e) Hind. on Pat. 431.

(f) *Rex v. Eyre*, 1 Stra. 43; 1 Gude, 234.

(g) See Dyer, 165 a, note; *Catesby's case*, 6 Rep. 61 B.

CHAPTER III.

SCIRE FACIAS TO HAVE EXECUTION OF A RECOGNIZANCE
AT COMMON LAW.

- A Recognizance at Common Law, what, p. 279.*
Before whom it may be acknowledged, p. 279.
In what respect it differs from a Bond, p. 280.
Must be enrolled, p. 280.
How witnessed, p. 281.
Certified into Chancery on Forfeiture, p. 281.
Recognizances ordered to be entered into by the Court of Chancery, p. 281.
Of Recognizances before Justices of Peace, p. 283.
Former Mode of certifying Recognizances before Justices of Peace, p. 283.
Stat. 22 & 23 Car. II. c. 22, p. 284.
Stat. 2 & 3 Geo. IV. c. 46, p. 285.
Present Practice as to Recognizances taken before Justices of the Peace, p. 285.
Recognizance before Justices an Obligation of Record as soon as it is taken, p. 287.
Power of Justices to mitigate or discharge Recognizances, p. 287.
Jurisdiction of the Court of Exchequer over Recognizances forfeited at Sessions, taken away, p. 288.
Yet still subject to the Control of the Court of Exchequer when estreated there, p. 288.
Mode of Estreat of Recognizances forfeited at Sessions, p. 288.
Stat. 3 & 4 Will. IV., c. 99, as to Recognizances before Parliament, the Superior Courts, and the Courts of Assize, p. 289.
These Recognizances, when forfeited, severally estreated into the Exchequer, p. 289.
New Rules of Practice as to estreating Recognizances in the Queen's Bench, p. 290.
Scire Facias to have Execution of, or to avoid Estreated Recognizances, p. 291.
Not necessary for the Queen, when, p. 291.
When necessary for the Queen, p. 291.
Its Form, p. 292.
Scire Facias for a Subject, p. 292.
Necessary, when, p. 292.
To have Execution of a Recognizance after a Year has elapsed, p. 292.
Scire Facias on Death of Comorsses, p. 294.
Scire Facias to have Execution of, or to avoid a Recognizance, with a Condition not on the Face of it broken, p. 295.
Rule as to estreating Recognizance with a Condition, p. 295.
Practice as to issuing Scire Facias on a Forfeited Recognizance in Queen's Bench, p. 298.
Costs, p. 301.
When Defect of Justice remedied by Audita Querela, p. 301.
Recognizances by Statute, p. 302.

A RECOGNIZANCE is either at common law or by statute. A recognizance at common law is an obligation of record, which a man enters into voluntarily (a), before some Court of Record or magistrate duly authorized (b), with condition to do some particular act; as to appear at the assizes, to keep the peace; to pay a debt (c); to pay the costs of an appeal from the decision of magistrates sitting in petty sessions (d); on removing an indictment by *certiorari* from a Court of Oyer and Terminer (e); or the like (f). It may be acknowledged before any one of the judges, or before the Lord Chancellor (g), in term or out of term in any

A recognizance at common law, what.

Before whom it may be acknowledged.

(a) *Anonymous*, 11 Mod. 53; *per Holt*, C. J. "At common law, without the help of any statute, any judge either of this Court or C. P. may take a recognizance for any sum on condition; for if a man will voluntarily enter into it, a judge has power to take it." And in *Fanshaw v. Morrison*, 2 Ld. Raym. 1141, the same learned judge said that if there were no statute giving power to take recognizances, a recognizance acknowledged in the C. P. would be good. "For any judge of this Court (K. B.), or of the C. P. might take a recognizance by the common law. And if a man would enter into such a recognizance voluntarily and there were no coercion used it would be a good recognizance." There are some cases, however, in which recognizances are entered into in which the act of the cognizor can scarcely be said to be voluntary, as to appear and give evidence or take his trial at the assizes—or remain in custody; to be of good behaviour for a given time—or continue in prison.

(b) Bro. Abr. tit. Recog. 24; Bac. Abr. tit. Exec. B.

(c) "A recognizance is a bond of record testifying the recognizor to owe a certain sum of money to some other; and the acknowledging of the same is to remain of record; and none can

take it, but only a judge or officer of record." Chitty's *Burn's Justice*, 29th ed. 689; Dalt. c. 186.

(d) By 1 & 2 Will. IV. c. 32 (the Game Act), a person appealing to the quarter sessions from a game conviction, must remain in custody until the sessions, or within three days after his conviction, enter into a recognizance with a sufficient surety before a justice of the peace to appear personally at the sessions to try the appeal, and pay such costs as shall be by the Court awarded."

(e) A recognizance on removing an indictment by *certiorari* from a Court of Oyer and Terminer, is a recognizance at common law, and not within the stat. 5 & 6 Will. & M. c. 11; 1 Gude, 227; *Rex v. Fonseca*, 1 Burr. 10; and see *Reg. v. Ewer*, 2 Salk. 563.

(f) 2 Tidd's *Prac.* 8th ed. 1131; 2 Bla. Com. 341.

(g) The Chancellor or Keeper may take recognizances and award execution or hold plea of *scire facias*, and *audita querela* in the Chancery to avoid execution, &c., as the case requires, on all recognizances taken in that Court, (Bac. Abr. tit. Exec. B). Another source of equitable jurisdiction to the Chancellor of considerable importance, though little noticed, arose from the practice of enrolling in Chancery cove-

part of England (*i*); and may also be recorded as well out of as in term (*k*). So by the custom of London, the mayor and aldermen or the mayor singly may take recognizances; and justices of the peace by commission have the same authority (*l*). And the Queen by special commission may appoint any person to take recognizances from one man to another; and such recognizances duly certified with the commission into Chancery are binding (*m*).

In what respects it differs from a bond.

Must be enrolled.

It is in most respects like another bond; the difference being chiefly this, that the bond is the creation of a fresh debt or obligation *de novo*; the recognizance is an acknowledgment of a former debt upon record (*n*). If it be not enrolled, however, it shall be taken or paid only as an obligation or specialty (*o*); as it is not a record until it is enrolled (*p*). But although enrolment is necessary to the validity of a recognizance, yet it bound the lands at the common law from the time of the caption (*q*), for it is the acknowledgment which gives a recognizance its force as a record, and the enrolment is for safe custody, and the notifying of it to others (*r*): since the Statute of Frauds (*s*), the day of the month and year of the enrolment of recognizances must be set down in the margin of the roll where the recognizance is enrolled, and it will only bind the conusor's lands in the hands of a *bond fide* purchaser from the time of such enrolment (*t*).

nants and agreements, releases of right, and declarations of uses, and of securing the performance of these deeds by a recognizance acknowledged before the Chancellor, and entered upon the close rolls. On application for writs of execution by reason of the alleged forfeiture of the recognizance, the Chancellor was of course bound to hear both parties, and to make such decrees between them as justice required, (Lord Campbell's Lives of Lord Chancellors, vol. i. p. 9).

(*i*) 1 Gude, 229.

(*k*) 2 Wms. Saund. 6th ed. 9 a, n. (5); *Ibid.* 710; 2 Tidd's Prac. 8th ed. 1131; Bro. Abr. tit. Recog. 20; Vaugh. Rep. 102, 103; Com. Dig. tit. Obligation, K.

(*l*) *Magdalen Chamberlain v. Thorpe*, Cro. Eliz. 187; 2 Tidd's Prac. 8th ed. 1131; Bac. Abr. tit. Exec. B; 2 Inst. 395.

(*m*) Fitz. Nat. Brev. 267; Alph. Register, 149; Bac. Abr. tit. Exec. B; Com. Dig. tit. Obligation, K.

(*n*) 2 Bla. Com. 341.

(*o*) Com. Dig. tit. Obligation, K; 2 Vern. 234; *Bottomly v. Lord Fairfax*, 1 P. Wms. 334.

(*p*) *Ghynn, Bart., and others v. Thorpe*, 1 B. & Ald. 153; 2 Wms. Saund. 6th ed. 67 b; Bac. Abr. tit. Exec. B; F. N. B. 267. The enrolment must therefore be averred in pleading, or the opposite party is not bound to treat it as a recognizance.

(*q*) Sheppard's Touchstone, c. 20, p. 359.

(*r*) *Hall v. Winchfield*, Hob. 195, 196; *Berry v. Bower*, 1 Vent. 360; Dyer, 306 b; 1 Rol. Abr. 892, pl. 11; 2 Rol. Abr. 393.

(*s*) 29 Car. 2, c. 3, s. 18.

(*t*) 2 Wms. Saund. 6th ed. 9 a, n. (5).

On being enrolled the recognizance is witnessed only by the record of the Court in which it is enrolled, and not by the conusor's seal; it is not therefore strictly a deed, and its effects are greater than a common obligation, being allowed a priority in point of payment, and as already stated, binding the conusor's lands from the time of the enrolment (u).

How witnessed.

Upon forfeiture of such a recognizance at common law, it must be certified into Chancery, and upon such a recognizance returned execution shall be sued in Chancery, as upon another recognizance there (x).

Certified into Chancery on forfeiture.

Receivers appointed by the Court of Chancery to receive the rents, issues and profits of lands, or other thing in question in the Court of Chancery pending the suit, where it does not seem reasonable to the Court that either of the parties to the suit should do it, are bound to account for such receipt when the Court shall require them, and to secure their doing so they are commonly ordered to enter into a recognizance with sureties (y).

The recognizance is entered into before the Master of the Rolls, and a Master (z) of the Court of Chancery, and is then carried by the Master's clerk to the Enrolment office in Chancery and enrolled there (a).

Recognizances ordered to be entered into by the Court of Chancery.

If the receiver do not pay the balances in his hands on an order being obtained on motion or petition, his recognizance may be put in suit (b), on taking the order to the Petty Bag office in Chancery.

The form of the recognizance entered into by receivers and their sureties is that they acknowledge themselves to be indebted to the cognizees (usually the Master of the Rolls, and the Senior Master of the Court) in the sums therein mentioned to be paid on certain days therein named; in default they agreeing that the sums therein mentioned shall be recovered of their heirs, &c., of all and singular their lands, goods and chattels, subject to a condition that the recognizance shall be void, if the receiver duly account for the rents and profits of the estate of which he is appointed receiver.

These recognizances being enrolled are perfected and become

(u) 2 Bla. Com. 341.

(x) F. N. B. 267 a; Com. Dig. tit. Obligation, K.

(y) 3 Dan. Chan. Prac. 400; Prac. Reg. 355, 356; 2 Harr. ed. Newl. 499.

(z) 1 Smith's Ch. Prac. 646. A receiver of the estate of a lunatic, and

his sureties enter in a recognizance now with two Masters in Lunacy, which recognizance is enrolled in the Enrolment office in Chancery, *Re Bull*, 2 Coop. Chan. Ca. 63, n. (b).

(a) 3 Dan. Chan. Prac. 433.

(b) 3 Dan. Ch. Prac. 452, 453.

then acknowledgments of debts upon record, and are then like unto judgments at law, and have been sometimes so called (c).

On default of payment of the balances in his hands by a receiver, on an order to put the recognizance in suit, the course of proceeding against the cognizors is by *scire facias*, requiring them to show if they have anything to say why the cognizees should not have execution issued against them (the cognizors) under the powers given by the Statute of Westminster the Second (d).

The record of the recognizance being in Middlesex, the fresh *scire facias* is directed to the sheriff of that county, although the cognizors live in other counties, and upon a *nihil* returned an *alias scire facias* issues into the county, or counties, where the cognizors, their heirs, executors, or administrators live, or where the land of a deceased cognizor lies.

If the sheriff of Middlesex should return a *nihil* as to one of the cognizors, a *mortuus* as to another, and a *scire feci* as to the third, proceedings must be then taken against them separately, by issuing an *alias* against the cognizor returned *nihil*; another against the heir and terretenants of the deceased cognizor; and as to the cognizor who has been warned and a *scire feci* returned, a rule must be left with the six clerks to the effect:

— } Unless the defendant answer on the morrow of the Holy
v. } Trinity next to come, let judgment be entered.

If the party against whom this rule be given do not appear and plead by the time the rule is out, judgment may be signed and execution may be issued.

If the cognizors, their heirs, executors or administrators appear and plead, then issue is joined according to the rules of the Petty Bag office, and the record having been made up and sealed, is transmitted into one of the superior Courts (e) to be tried; judgment is then entered upon it as upon a record of those Courts.

Recognizances entered into by order of the Court for any other purpose than that of receiving the rents and profits of estates, are proceeded upon in the same manner.

Recognizances between party and party for the payment of

(c) Dan. Cha. Pr. 453; 3 Bulst. 62.

(d) 13 Edw. I. c. 45; see *ante*, p. 4, and *post*, 293. An action at law will lie on a recognizance; but if the recognizance has been entered into in pursuance of an order of the Court of Chancery,

the Court will not allow it to be sued otherwise than by *scire facias* in that Court; *Grant v. Stone*, 1 Vern. 313.

(e) See stat. 12 & 13 Vict. c. 109, ss. 32, 33.

sums of money are sometimes, but not often at this day, acknowledged and enrolled in the Court of Chancery, and if put in suit, are to be prosecuted by *scire facias* in the same manner, with this exception, that as they are not entered into by order of the Court, there needs not any order for putting them in suit (*f*).

It has been already stated that justices of the peace by commission have authority at common law to take recognizances (*g*); but in the ordinary cases in which recognizances are now entered into before them, they are enabled to take them by the express words of certain statutes (*h*); and in some cases, as in recognizances to keep the peace, and be of good behaviour, or that persons accused will appear and take their trial for an offence and the like, "it is rather in congruity and reasonable intendment of law, than by any express authority given to them either by their commission or by the statute law," that they possess this power (*i*).

Of recognizances before Justices of the Peace.

"But a justice of the peace, acting as such, can take no recognizance, but only of such matters as concern his office; and if he doth it seemeth to be void" (*k*).

And every obligation and recognizance taken by justices of the peace by virtue of their office, must be made to the Queen, on pain of imprisonment of any person that shall take it otherwise (*l*).

Formerly, by statute 3 Hen. VII. c. 1, the justices certified the recognizances entered into by persons before them for keeping the peace to the next sessions, that the party might be called, and if he made default, the default was recorded, and the recogni-

Former mode of certifying forfeited recognizances before Justices

(*f*) 3 Dan. Chan. Prac. 455.

(*g*) *Magdalen v. Thorpe*, Cro. Elis. 187.

(*h*) At common law the connuses of a recognizance was entitled only to two writs of execution which he was bound to sue out within a year after the recognizance; one a writ of *levari facias*, by which the sheriff might levy the corn and other present profit of the land and the rents, payable by the tenants, and the beasts, levant and couchant; and the other a writ of *fi. fa.* by which the sheriff was to seize the goods and chattels in execution, afterwards by the stat. West. 2, 13 Edw. 1. c. 18, the land itself was subjected to execution by writ of *elegit*, 2 Wms. Saund. 6th. ed. 68, n. 1.

(*i*) 5 Chitty's Burn's Jus. 29th ed. 689; Crom. 125; Dalt. c. 168; 2 Hawk. c. 15, ss. 54, 62, 65. "Whosoever any statute giveth them power to take a bond of any man, or to bind over any man to appear at the assizes or sessions, or to take sureties for any matter or cause, they may take a recognizance; yea, wheresoever they have authority given them to cause a man to do a thing, there it seemeth they have in congruity, power given them to bind the party by recognizance to do it; and if the party shall refuse to be bound the justice may send him to gaol."

(*k*) Dalt. c. 198; 5 Chitty's Burn's Jus. 29th ed. 690.

(*l*) Dalt. c. 198.

of the
Peace.

Stat. 22 &
23 Car. II. c.
22.

zance with the record of the default was sent and certified into the Chancery, Queen's Bench, or Exchequer (*). The practice was, however, under old statutes to estreat recognizances forfeited before justices into the Exchequer, and process for enforcing the payment of the forfeiture was issued out of that Court (*). But irregularities arising in the estreat and return of these recognizances, the statute of 22 & 23 Car. II. c. 22, was passed for the remedy thereof, and having been made perpetual by the 4 & 5 Will. & Mary, c. 24, was in force respecting recognizances entered into before justices of the peace or the judges of assize until the statutes passed in the 3rd and 4th years of the reign of Geo. IV., and 3 & 4 Will. IV. c. 99. The statute of 22 & 23 Car. II. c. 22, was intituled "An Act for the better and more certain Recovery of Fines and Forfeitures due to his Majesty." In the preamble, after reciting that by old statutes it was provided that the estreats of fines should be certified and delivered into the Exchequer yearly, and that from thence the estreats of the summons should go forth through all shires for the levying thereof, since which many abuses and mischiefs were practised, not only by the not timely certifying and estreating the said fines, &c., but also by the sinister practice amongst officers in sparing, discharging, and not certifying at all, or if they do certify, yet by miscertifying and estreating the said fines, &c. into the said Court of Exchequer: the second section enacts, that from thenceforth "all fines, post fines, issues, americiaments, forfeited recognizances, sum and sums of money paid, or to be paid, in lieu or satisfaction of them or any of them, and all other forfeitures whatsoever which already are, or hereafter shall be set, imposed, lost or forfeited, in his Majesty's Courts of King's Bench, Common Bench, or Exchequer, shall be certified and estreated in and into the said Court of Exchequer twice in every year, yearly (that is to say) all fines, post fines, issues, americiaments, forfeited *recognizances*, sum and sums of money paid, or to be paid, in lieu or satisfaction of them, or any of them, and all other forfeitures whatsoever arising in any of the said Courts from the beginning of Hilary Term in every year to the beginning of every Trinity Term in every year, shall be, and are hereby ordained to be, certified and estreated in and into the said Court of Exchequer, the last day of every Trinity Term in every year. And all fines, post fines, issues, americiaments, forfeited *recognizances*, sum and sums of money paid, and to be paid, in lieu or satisfaction of them or any of them,

(*) 5 Chitty's Burn's Jus. 29th ed. 691.

(*) *Ibid.* 692.

and all other forfeitures whatsoever arising in any of the said Courts, from the beginning of every Trinity Term in every year to the beginning of Hilary Term in every year, shall be in like manner certified and estreated in and into the said Court of Exchequer, the said last day of every Hilary Term in every year."

Upon the return of these estreats, they were delivered into the hands of the Lord Treasurer's Remembrancer, who delivered them over to the clerk of the estreats, whose duty it then was to issue the summons of the Green Wax (*o*), which is a *levari* to the sheriffs of the respective counties, on the seal day after the return of the estreat into the Court of Exchequer. This was returned on the following Easter Term, and then the same officer issued a second summons to the sheriffs on the seal day after the following Trinity Term. In the Michaelmas or Hilary Term following, upon the return of the second process, the sheriffs were apposed before the foreign apposer, and those fines, &c. which were returned *nihil* were handed over through the clerk of the *nihil* to the Pipe office, and entered upon the great roll, and became debts upon record; and schedules from the great roll were sent out from thence to the office of the Lord Treasurer's Remembrancer, who, by his officers, ordered the process of extent to issue (*p*). Irregularities and hardships occasionally arising (*q*), the practice under this statute as to justices of the peace was altered by the 2 & 3 Geo. IV. c. 46; and by the 3 & 4 Will. IV. c. 99, as to recognizances taken by either House of Parliament, or by the judges of assize.

By section 2 of 3 Geo. IV. c. 46, all recognizances forfeited before any justice or justices of the peace in England are to be certified by him or them to the clerk of the peace of the county, or town clerk of the city, borough, or place, in writing, containing

2 & 3 Geo.
IV. c. 46.
Present
practice as
to recogni-
sances
taken be-

(*o*) This is a writ so called from the colour of the wax, with which it is sealed. It is said in a note to C. B. Gilbert's Treat. on Exch. p. 74, that the summons of the green wax is the same with the summons of the pipe, and the form of the latter is given at p. 114 of the same work, from which it appears to be a writ directed to each sheriff commanding him to be before the treasurer, and barons of the Exchequer at Westminster on the morrow of the *Idas* (or octave) of Easter next following, and to have then there whatever he

owes the King, &c. To this writ is annexed a transcript of all the items of the casual revenue with which the particular sheriff is chargeable. It is laid down in the same treatise (p. 115), that the summons of the pipe is in the nature of a *fi. fa.* and (p. 131), that the sheriff is to levy the charges attached to the summons of the green wax.

(*p*) See *Rex v. Shackell and others*, M'Clelland & Younge, 523, as to the old practice.

(*q*) *Ibid.* 514.

fore justices
of the
peace.

the names, residences, and calling of the parties, with the amount of the sum forfeited, and the cause of the forfeiture, signed by such justice or justices, "on or before the ensuing general or quarter sessions of such county, city, borough, or place respectively; and such clerk of the peace, or town clerk, shall copy on a roll" such forfeited recognizances, and shall within such time as shall be fixed and determined by such Court, not exceeding twenty-one days after the adjournment of such Court, send a copy of such roll, with a writ of *distringas* and *capias*, or *feri facias* and *capias*, to the sheriff of such county, or the sheriff, bailiff, or officer of such city, borough, or place, having execution of process therein respectively, which shall be the authority to such sheriff of such county, or sheriff, bailiff, &c. for proceeding to the immediate levying and recovering of such forfeited recognizances (r). By section 4 of 4 Geo. IV. c. 37, the sheriff, bailiff, or other officer, is immediately after the expiration of his year of office to make out an account, in writing, of the names and residences of all persons incurring forfeited recognizances which he has been authorized or required to levy; and if any forfeited recognizance has not been paid, he shall state the causes of its nonpayment. And such sheriff, bailiff, &c. is to transmit this account within thirty days after the expiration of the year for which it is made up, to the Lords Commissioners of her Majesty's Treasury, in order that it may be duly executed, checked, and inspected; and when so executed and approved, such account is transmitted to the proper officer of the Court of Exchequer, authorized to pass it. And by section 5, every clerk of the peace, and town clerk, or other proper officer, is required, within twenty-one days from the opening of the Court of General or Quarter Sessions, to send to the Lords Commissioners of her Majesty's Treasury, a copy or extract of the roll delivered by the sheriff, bailiff, or other officer, at the opening of such Court of Quarter Sessions, with the causes of discharge, if any person has been relieved on appeal from such forfeited recognizance, &c. (s).

(r) And see 4 Geo. IV. c. 37, s. 1, as to justices inserting in the roll of future quarter sessions, all past forfeited recognizances not levied. And *ib.* s. 3, as to the mode of levying forfeited recognizances, where the party resides out of the jurisdiction of the sheriff; and see 7 Geo. IV. c. 64, s. 31, as to cases in which recognizances in certain cases are not to be estreated without the

order of the judge, or presiding justice.

(s) See also sec. 14 of 3 & 4 Geo. IV. c. 46, by which all clerks of the peace, are on or before the second Monday after the morrow of All Souls, yearly in every year to make and deliver into the Court of Exchequer, a true and perfect duplicate or certificate of all forfeited recognizances, &c., for the pur-

If a prosecutor or witness should refuse to enter into a recognizance to prosecute or give evidence, the magistrate has power to commit him, this being virtually included in his commission, and by necessary consequence under the statute 7 Geo. IV. c. 64, sects. 2 & 8. This doctrine was confirmed in a case where a married woman refused to enter into a recognizance for her appearance at sessions, to give evidence against a felon, and the magistrate committed her, and the Court afterwards held that the commitment was legal (t).

The recognizance entered into before justices of the peace is an obligation of record as soon as it is taken and acknowledged, although not made up by the justice, and only entered in his book (u). But after it is drawn up on parchment, it must be subscribed by the justice before whom it is taken (x).

Recognizance before justices an obligation of record as soon as it is taken.

The provisions of these statutes, however, do not take away the power of a justice to take recognizances at common law by commission, which, if estreated, must, it seems, be certified into Chancery (y).

If a recognizance be estreated at the Quarter Sessions, and a writ issue to the sheriff to levy, under the statute 3 Geo. IV. c. 46, and the sheriff levy the amount, the Court of Quarter Sessions has the power under the 6th section of that Act to mitigate the amount, although the money has been actually levied, and the sheriff must pay back the difference to the party (z).

Power of justices to mitigate or discharge recognizances.

The Court of Exchequer has no jurisdiction over estreats not

pose of being levied to the intent that the sheriffs on their apposals in the said Court of Exchequer, may be charged in their accounts for the moneys levied, and that all parties entitled to any such recognizances, &c., or any portion thereof, may be at liberty to claim the same before the foreign apposer of the Court of Exchequer, according to the ancient course and practice of the said Court. (See 3 Chitty's Burn's Jus. 29th ed. 35, tit. Fines, Forfeitures.)

The 7 Geo. IV. c. 64, ss. 2 and 3, requires magistrates, instead of certifying to the sessions recognizances of bail, or to prosecute, or give evidence, to deliver them to the proper officers of the Court, before or at the opening of

the Court.

(t) *Bennett v. Watson*, 3 M. & Sel. 1; 1 Hale, 586; 2 Hale, 121—282; 2 Hawk. c. 8, s. 58; *Cropper v. Horton*, 4 D. & R. M. C. 42, S. C.; 8 D. & R. 166; 2 Chitty's Burn's Just. 29th ed. 473.

(u) Dalt. c. 168.

(x) Stat. 7 Geo. IV. c. 64, ss. 2 & 3.

(y) See *ante*, p. 283.

(z) *Haynes v. Hayton, Esq.* 2 Car. & Payne, 624; S. C. 7 B. & C. 293; *The Queen v. The Justices of the W. R.* 7 Ad. & El. 592; and see further 7 Geo. IV. c. 64, s. 31, as to power of recorder and justices of quarter sessions to mitigate or discharge recognizances, estreated as shall seem to them to be just.

returned into it since the 3 Geo. IV. c. 46, s. 6; the Quarter Sessions, only, have jurisdiction at their discretion to order the discharge of forfeited recognizances (a).

Jurisdiction of the Court of Exchequer over recognizances forfeited at sessions, taken away by the 3 Geo. IV. c. 46.

Nor has the Court of Exchequer any jurisdiction over recognizances forfeited at Quarter Sessions, whereof the yearly duplicate or certificate required by the 14th section of 3 Geo. IV. c. 46, has been delivered into the Court. Therefore, where a recognizance for appearing and preferring an indictment at a Court of Quarter Sessions had been forfeited and certified into the Exchequer, and the forfeiture had been levied by the sheriff of the county, pursuant to 3 Geo. IV. c. 46, the Court held that they were not authorized to order the discharge of the recognizance, although the justice of the peace, before whom the recognizance had been taken, did not comply with the 4th section of the statute, by giving the party bound a written or printed notice of the time and place at which the sessions were to be holden; and the party had applied for relief at the ensuing Quarter Sessions, which was refused. But the Court of Exchequer still has jurisdiction over recognizances forfeited at the assizes (b).

But the jurisdiction of the Court of Exchequer is not ousted by the 3 Geo. IV. c. 46, and 4 Geo. IV. c. 37, where a forfeited recognizance has been actually estreated into the Exchequer from "a Court of Quarter Sessions" (c).

Yet still subject to the control of Court of Exchequer when estreated there.

From the time that fines, recognizances, &c. are once estreated into the Exchequer they become subject to the orders, not of the original authority by which they were at first imposed, but to the control of the Court of Exchequer, as being thenceforth part of the casual or foreign revenue, commonly known by the denomination of profits of the Green Wax (d).

Mode of estreat of recognizances forfeited at sessions.

"It is now (since the passing of the 3 Geo. IV. c. 46) the duty of the sessions not to estreat the forfeited recognizance into the Court of Exchequer as formerly, but to issue process thereon immediately themselves, in order that the amount may be forthwith levied; and the clerks of the peace have no longer any authority to send the estreat into the Court of Exchequer."

There can be no doubt, however, that whenever a recognizance becomes once estreated into the Exchequer, that Court has jurisdiction over it. The great source of their authority is a writ of Privy Seal, which is issued at the commencement of every reign,

(a) *Rex v. Thompson*, 3 Tyr. 53.

(c) *Ex parte Pellow*, M'Clel. 111.

(b) *Rex v. Hawkins*, M'Clel. & Y. 27.

(d) *In re Norwich*, 11 Price, 767; Price's Treat. on the Exch. book i.

by virtue of which the Court is fully empowered in their discretion, according to the equitable circumstances of each particular case, generally to compound, mitigate, or discharge estreated recognizances (e).

With regard to recognizances required to be entered into by either House of Parliament, by the superior Courts of Common Law, or by the Courts of Assize, and the mode of certifying their estreat—

The 3 & 4 Will. IV. c. 99, repeals the 22 & 23 Car. II. c. 22, which regulated the practice as to estreated recognizances formerly, and enacts, by section 23, that an account of the recognizances, &c. imposed and ordered to be estreated by the Lords Spiritual and Temporal in Parliament assembled, shall, within fourteen days next after every session of Parliament, be made out by the Clerk of the Parliament, and sent to the Lord High Treasurer, or to the Commissioners of her Majesty's Treasury, and be certified and estreated into her Majesty's Court of Exchequer (f).

3 & 4 Will. IV. c. 99, as to recognizance before parliament, the superior courts, and the courts of assize.

These recognizances, when forfeited, severally estreated into the Exchequer.

By section 25, the Clerk of the House of Commons must, within fourteen days next after every session of Parliament, make out an account of all recognizances certified by the Speaker, to be estreated by him into the Exchequer.

By section 26, the Queen's Coroner, and Attorney of her Majesty's Court of Queen's Bench, and the Prothonotaries of her Majesty's Court of Common Pleas, and her Majesty's Remembrancer of the Court of Exchequer, and also the Masters and Prothonotaries of the office of Pleas in the same Courts respectively, shall, on the first day of every Term, make out an account of all recognizances, fines, &c. imposed and forfeited in the said Courts respectively, and not before estreated, and transmit the same to the Commissioners of her Majesty's Treasury; and by section 27, the said coroner, &c. must certify and estreat all forfeited recognizances not received in and into the Court of Exchequer.

(e) *In re Pellow*, 13 Price, 302.

"By the repeal of 22 & 23 Car. II. c. 22, and the substitution of the mode of recovering suits forfeited on recognizances under the 3 Geo. IV. c. 46, the Court of Exchequer no longer retains any jurisdiction over two sorts of forfeited recognizances, namely *those* before justices out of sessions, and those at the quarter sessions; *Reg. v. Justices of the W. R.*, 7 Ad. & El. 590.

See also *Haynes v. Hayton*, 7 B. & C. 293; *S. C.* 2 C. & P. 621, as to power of justices to discharge a forfeited recognizance under the 6th sect. of 3 & 4 Geo. IV. c. 46.

(f) The Chief Justice of England, or any judge, may bind a peer to appear the first day of the next sitting of Parliament to answer as accessory to a murder, 1 Gude's King's Bench Prac. Crown side, 228.

And by section 29, an account in writing of all recognizances, &c., imposed or forfeited, to or for the use of her Majesty, by or before any judge or judges of assizes, clerk of the market, or commissioners of sewers, throughout the kingdom of England, shall within fourteen days next after such recognizances, &c., are forfeited, be made out by the clerk of assize, clerk of the market, commissioners of sewers, and coroners, or other person, or persons, to whom it appertains, to make estreat thereof, with the nearest residence of the parties liable to make payment thereof; and shall make out two copies, one to be sent to the commissioners of her Majesty's treasury, and the other to the commissioners for auditing the public accounts. And such recognizances, &c., shall, within the time last aforesaid, be duly certified and estreated by such officers and persons respectively in and into the Court of Exchequer (g).

By section 31, her Majesty's Remembrancer of the Court of Exchequer is to make out an account in writing of all forfeited recognizances, &c.; and by section 32, he is to issue process for duly levying the same (h).

The ancient power and jurisdiction of the Court of Exchequer is not interfered with by this Act (i); and this Court has still the power (on application for its favour) under a writ of privy seal, issued at the commencement of every reign, to compound or discharge any recognizances, &c. (j). This Court also, at common law, had the power to discharge or to allow a party to compound in respect of an estreated recognizance, according to the equity and circumstances of the case (k).

By the rules, orders, and regulations made by the Lord Chief Justice and Judges of the Court of Queen's Bench, relating to the practice and general business transacted on the Crown side of that Court, pursuant to the provisions of the 6th Vict. c. 20, s. 16, it is ordered,

New rules
of practice

By rule 24, "That, every recognizance acknowledged on the

(g) As to the mode of estreating or discharging recognizances in the Queen's Bench for non-appearance or any other cause, and the practice thereon *in extenso*, vide 1 Gude, 229; and see *post*. There is no stamp duty required to a recognizance, and it is engrossed on parchment and returned to the Court where the party is bound to appear. The magistrate or judge signs

the recognizance as taken before him; but it is not necessary for the parties themselves to sign it, 1 Gude, 227.

(h) And see sects. 45 and 46.

(i) See sect. 38.

(j) 2 Mann. Exch. Prac. App. 253; 33 Hen. VIII. c. 39; *Rex v. Hawkins*, M'Clel. & Y. 27.

(k) *R. v. Tomb*, 10 Mod. 278; *Re Pellet*, M'Clel. 101.

removal of an indictment, order, or other proceeding, or to prosecute any information granted by the Court, or for the appearing or answering of any party in the said Court, or for good behaviour, shall, after the acknowledgment thereof, be transmitted to the Crown office, and filed there.

as to the
estreating,
&c. of recog-
nizances
in the
Queen's
Bench.

Rule 25.—“No recognizance shall henceforth be forfeited, estreated, or put upon the estreat roll, unless a rule or notice shall have been previously served upon the parties by whom such recognizance shall have been given, calling upon them to perform the conditions thereof; and no default shall be considered to be made in performing the conditions of a recognizance, by reason of the trial of any indictment or presentment, or the argument of any order or conviction, or other proceeding, having stood over where such indictment has been made a *remanet*, or such indictment or order has stood over by order of the Court, or by consent in writing of the parties.

Rule 26.—“No recognizance shall henceforth be forfeited, or estreated, or put upon the estreat roll, in respect of any alleged default, without the order of this Court (or of a judge thereof)” (1).

Having thus shown the nature and object of common-law recognizances, and of those recognizances of a similar kind which have been created by statute, and their modes of estreat, we will now direct attention to the cases in which a writ of *scire facias* is requisite in order to have execution of, or to avoid such estreated recognizances.

Scire facias
to have
execution
or to avoid
estreated
recogni-
zances.

A *scire facias* to have execution of a recognizance lies either for the Queen or for a subject.

It is not necessary for the Queen where more than a year has elapsed since the recognizance was acknowledged; for *nullum tempus occurrit Regi* (m). Nor is it necessary for the Queen, on the death of the conusor, against his executor or personal representative; the proceeding on the part of the Crown, in that case, being by writ of *diem clausit extremum*, against his lands and chattels. But if it be doubtful whether the recognizance be forfeited to the Queen, then in such cases a *scire facias* is generally issued, that the fact of its forfeiture, or otherwise, may be established (n). When this writ issues for the Queen, it is a judicial writ issuing out of and under the seal of the Court of Exchequer; it recites the

Not neces-
sary for the
Queen,
when.

When ne-
cessary for
the Queen.

its form.

(1) See Corner's *Prac. of the Crown* ed. 1140.

Side of the Q. B. Append. p. 6.

(n) *Gilb. Exch.* 166; *Tidd's Prac.*

(m) 2 *Salk.* 605; *Gilbert's Exch.* 8th ed. 1140.

166; 1 *Price*, 395; *Tidd's Prac.* 8th

recognizance on which it is founded, and commands the sheriff to warn the defendant to appear before the Barons of her Majesty's Exchequer, at Westminster, on a certain day, to show cause why the Crown should not have execution of the sum acknowledged to be due (o).

Scire facias
for a sub-
ject.

A *scire facias* to have execution of, or to vacate and set aside (p), a recognizance at common law, entered into with any subject, is an original proceeding (q), and it is necessary—

Necessary,
when.

1. Where more than a year has expired since it was forfeited.

2. On the death of the conusee since its acknowledgment, for his executor to have execution of it,—and

3. Whether entered into to the Queen or a subject, where the recognizance is entered into with a condition, which on the face of it does not appear to be broken, but requires extrinsic evidence to prove it to be broken, on which the conusor may take issue, or to which he may have a good answer.

To have
execution
of a recog-
nizance
after a year
has elapsed.

And first, of *scire facias* to have execution of a recognizance, after more than a year has expired, since its forfeiture.

By Statute of Westminster the Second, 13 Edw. I. c. 18, "When debt is recovered or knowledged in the King's Court" (*that is by recognizance knowledged in any Court of record that hath power to receive the same*) (r), "or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *fi. fa.* unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough, and the one half of his land (s), until the debt be levied upon a reasonable price or extent." (t).

And by Statute of Westminster the Second, 13 Edw. I. c. 45, it is

(o) This writ is signed by the Queen's Remembrancer, and tested in the name of the Chief Baron. The practice is similar to the practice on the Crown side of the Queen's Bench, *post*, 299; and see 2 Tidd's Prac. 8th ed. 1141.

(p) Bac. Abr. tit. *Scire Facias*, A.

(q) 2 Tidd's Prac. 1140.

(r) 2 Inst. 395. So "if two do acknowledge a recognizance of 100*l.* *quolibet eorum in solido*, that is jointly and severally, the conusee may sue severall *scire facias* against the conusors upon this recognizance."

(s) By stat. 1 & 2 Vict. c. 110, s. 11,

all a debtor's lands are now subject to execution.

(t) "By the common-law, execution upon a judgment or recognizance for a common person was generally by *levari facias*, commanding the sheriff *quod levare facias de terris et catallis*, &c., the debt," 3 Co. 12 a; 2 Inst. 394; Com. Dig. tit. Exec. C, 1. "Or by *fi. fa.* commanding the sheriff *quod fieri facias de bonis et catallis*," &c., 3 Co. 12 a; and by the stat. 25 Edw. III. stat. 5, c. 17, "against the body." Com. Dig. tit. Exec. C, 2; and see *ante*, p. 283, note (h).

enacted, "Because that of such things as be recorded before the Chancellor, and the Justices of the King, that have record and be enrolled in their rolls, process, or plea, ought not to be made by summons, attachments, *essoins*, view of land, and other solemnities of the Court as hath been used to be done of bargains and covenants made out of the Court; from henceforth it is to be observed, that those things which are found enrolled before them that have record, or contained in fines, whether they be *contracts*, *covenants*, or *obligations*, services or customs *knowned*, or other things whatsoever enrolled, wherein the King's Court without offence of the law and custom may execute their authority, *from henceforth they shall have such vigour that hereafter it shall not need to plead for them*. But when the plaintiff cometh to the King's Court, if the *recognizance* or fine levied be *fresh*, that is to say, levied within the year, he shall forthwith have a writ of execution of the same *recognizance* made. And if the *recognizance* were made, or the fine levied of a further time passed, the sheriff shall be commanded that he give *knowledge* to the party of whom it is complained that he be afore the justices at a certain day *to show if he have anything to say why such matters enrolled or contained in the fine ought not to have execution*. And if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the sheriff shall be commanded to cause the thing enrolled or contained in the fine to be executed."

This statute therefore makes a *recognizance* enrolled in a Court of record of the same effect as a judgment, upon which, if the "*recognizance* be fresh, that is to say, levied within the year," the connusee "*shall forthwith have a writ of execution*;" but if a "further time has passed," then a *scire facias* is necessary in order to have execution (u).

In commenting upon this statute, Sir Edw. Coke, in his 2nd Inst. (x), says, "Some diversity of opinion hath been, whether there was a *scire facias* at common law before this Act; and the doubt grew for want of distinguishing between personall actions and real actions;" that a *scire facias* lay in real actions to have execution of the lands, and by this Act the *scire facias* was given

(u) 2 Wms. Saund. 6th ed. 71 c. "So by the common law upon a *recognizance* in Chancery, a *levari facias* lies within a year against the *recognizor*, though lay, for the money mentioned in the *recognizance*, *de terris et catallis leand*. F. N. B. 265. D. But after

a year he must have debt upon a *recognizance* at the common law; and now by the stat. West. 2, c. 45, a *scire facias*. And in lieu of a *levari facias* by the stat. West. 2, c. 18, he shall have an *elegit*." Com. Dig. tit. Exec. C, 1.

(x) p. 469.

in personal actions in lieu of a "new original" on the judgment after a year (y).

"It hath been ruled," says Sir Edward Coke (x), "that these words 'if the recognizance or fine levied be fresh, that is to say, levied within the year,' have relation to the *teste* of the recognizance, and not to the day of payment; and therefore if a recognizance be acknowledged to pay a summe a year and a halfe after, a *scire facias* lieth, and no *feri facias*."

A *scire facias* to have execution of a recognizance at common law may issue out of Chancery, as has been seen (a). The writ issues out of the Petty Bag, and is tested in the name of the Master of the Rolls, and of the clerk of the Petty Bag (b). And the practice as to the issuing of *testatum scire facias*, declaration, plea, issue, and sending a transcript of the record into the Queen's Bench to try the issue, is similar to the practice set forth in the chapter on *scire facias* to repeal letters patent (c).

Scire facias
on death of
conusee.

Secondly, of *scire facias* on the death of the conusee, by his executor to have execution of a recognizance.

If the conusee of a recognizance at common law die before execution have been sued out on the recognizance, his executor shall not sue it even within the year, without bringing a *scire facias* against the conusor (d). The reason assigned in the books is, because the law presumes that the debt might have been paid to the testator, and therefore will not suffer the debtor to be molested, unless it appear that he hath omitted to perform the recognizance; and for that purpose a *scire facias* must be brought by the executor, for the alteration of the person altereth

(y) See as to this, Introductory Chapter, and see 3 Bla. Com. 160.

(x) 2 Inst. 470; and see Year Book, 8 Edw. III. fol. 44, pl. 16.

(a) *Ante*, p. 281; Com. Dig. tit. Obligation, K; and see references to forms, *post*, Appendix.

(b) According to ancient simplicity the place where the Lord Chancellor carried on the business of his office, was divided between the "Hanniper" or hamper, in which writs were stored up; and the "Petty Bag," in which were kept the records and proceedings in the suits to be decided by himself. (Lord Campbell's Lives of Lord Chancellors, vol. i. p. 6.)

(c) *Ante*, book iii. ch. ii.; and see references to forms, *post*, Appendix. The 11 & 12 Vict. c. 94, s. 29, expressly enabled an issue on *scire facias* on a recognizance out of Chancery to be tried in any of the superior Courts. That statute, however, was repealed by the 12 & 13 Vict. c. 109, for regulating the practice of the Petty Bag office, the 32nd sect. of which appears to apply to writs of *scire facias* to have execution of recognizances; see also on the subject of reviving a judgment or recognizance after a year and a day by *scire facias*, ch. ii. of the first book, *ante*.

(d) 2 Inst. 395; 2 Wms. Saund. 6th ed. 71 c.

the process at common law (e). And "one that is not party to the record, recognizance, fine, or judgment, as the heir, executor, or administrator, though they be privy, and though it be within the year, shall have no writ of execution, but are to have a *scire facias* to enable themselves to the suit, and so likewise of the tenant or defendant's part" (f). This branch of the subject has, however, been fully treated of in the chapter on *scire facias* by and against executors (g).

Thirdly, of *scire facias* to have execution of, or to avoid a recognizance entered into, with a condition, which on the face of it does not appear to be broken, but which requires extrinsic evidence to prove it to be broken.—

Scire facias to have execution of or to avoid a recognizance with a condition not on the face of it broken.

If a recognizance be merely an acknowledgment of a debt which is recorded, the production of a certified copy of the roll on which it is recorded, to the proper officer, if satisfaction does not appear to be entered on the record, is undeniable evidence of the conusee's right to have a writ of execution for the amount of the debt acknowledged to be due. So if the recognizance enrolled be conditioned to pay the debt acknowledged, on a day named, the production of a certified copy of the record, to the proper officer, after the day named has passed, without any satisfaction appearing to be entered on the record, is undeniable evidence of the conusee's right to a writ of execution for the amount of the debt acknowledged. But before execution can be issued on a recognizance with a condition, it must be shown that the condition has not been performed, and the default having been recorded, that therefore the recognizance is forfeited. And it lies upon the conusee or the plaintiff to show this (h).

The rule appears to be, that wherever beyond all doubt or question the condition of a recognizance has not been performed within the knowledge of the Court, by the default of the conusor, as where the condition is that he shall appear at the Sessions, and he does not appear, that then the recognizance may be declared to be forfeited, and be estreated (i); because the forfeiture has been

Rule as to estreating recognizances with a condition.

(e) 2 Tidd's Prac. 1146, 8th ed. Bac. Abr. tit. *Scire Facias*, C 2.

(f) 2 Inst. 471; and see *Pennoyer v. Brace*, 1 Salk. 319, and *ante*, book ii. ch. i.

(g) See *ante*, book ii. ch. v.

(h) *Faulshaw v. Morrison*, 2 Ld. Raym. 1140.

(i) By the 3 Hen. VII., c. 1, it is enacted, "That if the party who is called

at a session of the peace upon a recognizance for keeping the peace, make default the default shall be there recorded, and the recognizance with the record of the default shall be sent and certified into the Chancery, or afore the King in his Bench, or into the King's Exchequer," Bac. Abr. tit. *Surety of the Peace*, H.

He who is bound to keep the peace

incurred in the face of the Court (*k*). But if the forfeiture has not been incurred in the face of the Court, as if the condition were that he should keep the peace to all her Majesty's subjects for twelve months, and within that time he has committed an assault—a fact which has occurred beyond the precincts of the Court, and which may admit of doubt, or question, or lawful excuse (*l*), which can only be determined by inquiry, then the conusor has a right to be heard, and shall not be prejudiced without that hearing; "no rule being more invariable than that a person shall not be prejudiced in any manner without being heard" (*m*). The recognizance in such a case cannot be declared to be forfeited until the conusor has had an opportunity of denying the forfeiture, or setting forth his answer or excuse, if he have any (*n*). The mode of proceeding in such a case, in order to have the recognizance declared forfeited, is by *scire facias*, which, in Crown cases, issues out of the Crown Office of the Queen's Bench (*o*), calling upon the conusor to show if he have anything to say for himself, why the sum which he has acknowledged to owe should not be levied on his goods and chattels, lands and tenements, according to the force, form, and effect of his recognizance. And until judgment has been obtained on that *scire facias* against the conusor, execution cannot issue against him.

*Rex v.
Cousins.*

Thus in the case of *Rex v. Cousins* (*p*) (before the passing of the Act 3 Geo. IV. c. 46), where a recognizance to be of good behaviour was entered into at quarter sessions, and at the next quarter sessions, it being proved, by witnesses in open Court, that the party had been guilty of misbehaviour since entering into the

and to appear at a sessions of the peace, must appear and record his appearance, otherwise his recognizance is forfeited. *Ibid.* Though the justices may if they think fit equitably consider the reasonableness of any excuse he may have, and may discharge or respite the recognizance to the next sessions, (1 Hawk. c. 60, s. 18; Dalt. c. 120; Bac. Abr. tit. Surety of the Peace, H.

(*k*) *Reg. v. Justices of West Riding* 7 Ad. & El. 587; *Haynes v. Hayton*, 7 B. & C. 293.

(*l*) It may in the general be said that the recognizance is not forfeited by any assault which could have been justified in an action or upon an indictment for

the assault, Bac. Abr. tit. Surety of the Peace, H.

(*m*) Per Lord Denman in *The Queen v. The Justices of the West Riding*, 7 Ad. & El. 592.

(*n*) A recognizance forfeited by breach of the condition, becomes *de facto* a judgment of record in all the Courts, but is not such and so conclusive, as that execution may be sued out thereon without a *scire facias*. Price's Pr. of the Superior Courts, 509, n. (*o*).

(*o*) 1 Gude, 233.

(*p*) Parker's Rep. 54, and *Perrome's case*, 1 Rol. Abr. 900, Exec. O, pl. 4, is to a similar effect; and see *Rex v. Hutchings*, Cro. Jac. 412.

recognizance, the justices estreated it. On motion to discharge the estreat, it was urged, that the sessions could not in a summary way try the fact of misbehaviour committed out of Court, but that the recognizance ought to have been removed into the Court of Exchequer, and a *scire facias* sued out, and a breach assigned, which Cousins and his pledges might controvert by pleading to the *scire facias*. The Court of Exchequer discharged the estreat.

The 8 Geo. IV. c. 46, which relates to recognizances estreated at quarter sessions, merely facilitates the levying of the penalty where such recognizances are and could formerly have been forfeited at the sessions or otherwise, and in no way affects the question how such recognizances can be legally forfeited. Thus since the passing of that statute, the Court of Queen's Bench has held, in a case where a conusor, bound in a recognizance to keep the peace, was subsequently convicted at petty sessions of an assault, and the conviction was returned to the quarter sessions, that the justices were not authorized under that Act to order an estreat of the recognizance, but that the proceeding for that purpose must be by *scire facias*, as before the statute; and the Court of sessions having made such order, the Court of Queen's Bench granted a *certiorari*, to bring it up for the purpose of being quashed (q).

(q) *R. v. Justices of W. R. of Yorkshire, Re Dr. Thornton*, 7 Ad. & El. 583. In this case a rule was obtained calling on the above-mentioned justices to show cause why a *certiorari* should not issue to remove into the Queen's Bench a recognizance of the peace entered into by one Thornton a doctor of medicine and two sureties, with the record of the conviction of the said Thornton, and an order of sessions directing the said recognizance to be estreated. The motion was made on Dr. Thornton's affidavit, from which it appeared that in April, 1836, he appeared before the magistrates in petty sessions at Wakefield, on a peace warrant, and was then bound by recognizance in 100*l.* with two sureties in 50*l.* each, to keep the peace for two years towards all her Majesty's subjects, and particularly towards one *W. Stewart*. In July, 1836, he was summoned before the magistrates in Petty Sessions

at Wakefield, by one *Peaker* for an assault, and was convicted in the penalty of 5*l.* and costs, which he paid; and he alleged that the said assault on *Peaker* was committed in self-defence. At the W. R. quarter sessions in October, 1836, the Court was moved to estreat the said recognizance, which the Court ordered. The clerk to the magistrates deposed, that "the Court was moved by counsel at the said sessions to estreat the said recognizance, and that the motion was opposed by counsel on behalf of Dr. Thornton; and that on the hearing, the identity of Thornton, as being the same person who entered into the recognizance, and who was subsequently convicted as aforesaid, was proved.—*Patteson, J.* "Could we in this Court declare a recognizance of the peace forfeited on affidavit of a breach of the peace?" The counsel for the plaintiff contended that the

*Re v. Jus-
tices of W. R.
of Yorkshire.*

Rex v. Wiblin.

So in the case of *Rex v. Wiblin* (r): the defendant entered into a recognizance before a magistrate, in the sum of 20*l.*, to keep the peace for one year towards all his Majesty's subjects, and within the year committed an assault; a *scire facias*, setting out the recognizance, and suggesting this breach of it by the assault, was issued, commanding the sheriff to make it known to the defendant, that he might show why the amount of the recognizance should not be levied on him. The defendant pleaded that the sum ought not to be levied on him, because he was not guilty of the assault, on which issue was joined, and the assault having been proved by evidence, a verdict was found for the Crown.

In any case in which it is not the practice of the Court to estreat a recognizance with a condition upon motion, the proceeding to do so must be by *scire facias* (s), and the mode of proceeding is as follows:—

Practice as to issuing a

When a person has entered into a recognizance to keep the

Courts cannot so try a fact which the defendant, and also his sureties ought to have an opportunity of pleading (*Rex v. Hawkins*, M'Clel. & Y. 27. *In re Fellow's Recognizance*, 13 Price, 299; *S. C.* M'Clel. 111). Lord Denman: C. J., in delivering judgment said, "It certainly would seem to be extraordinary if this recognizance was duly estreated upon formal proof before the sessions of a proceeding had elsewhere, in which the recognizance neither had, nor by possibility could at all come into question. A sufficient effect is attributed to the 3 Geo. IV. c. 46, if we consider it to be applicable to recognizances lost or forfeited before justices out of sessions, and also at the Court of Quarter Sessions itself, for matters immediately connected with its own proceedings. The question of *how* the recognizance may be legally forfeited, seems to remain untouched. Nor is the argument in favour of the jurisdiction of the sessions advanced, by attending to the state of the law generally upon this subject. *No rule is more invariable than that a person shall not be prejudged in any manner without being heard.* The applicant may not be

the same person convicted; or the conviction may have been wrong; or he may have had cause to show against the forfeiture of his recognizance, which he has had no opportunity of doing. We were referred to the authorities, collected in Bacon's Abridgment under the title *Scire Facias*, C, 2, (7 Bac. Abr. 135, 7th ed.) and we shall advert to one of them: 'If a man be bound in a recognizance to the King, upon condition to be of good behaviour, &c., he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance without *scire facias*;' and a weighty reason is given: 'for if a *scire facias* had been brought, he might have pleaded some matter in discharge thereof;' and in the case of *Rex v. Hutchins*, (Cro. Jac. 412), which is there referred to, which was a recognizance for good behaviour taken in the Crown office, it appears that a writ of *scire facias* was brought, and upon inquiry, we find that the course of proceeding in the Crown office is uniformly in conformity thereto." Writ granted.

(r) 2 Car. & P. 10.

(s) Corner's Prac. of the Crown Side of the Q. B., 252.

peace, which becomes forfeited by his committing any breach of the peace; if it were acknowledged at the Sessions, or before a magistrate, a writ of *certiorari* must be obtained to remove it into the Crown office, if it have not been transmitted there pursuant to the new rules and orders of the Court of Queen's Bench, made under the authority of 6 Vict. c. 20 (*t*). This writ is obtained on laying an affidavit of the circumstances before a judge at chambers, who will grant a fiat for the writ to issue; when the writ has been served, and the recognizance is returned, a writ of *scire facias* is sued out at the Crown office, stating the recognizance, and suggesting the breach of it (*u*). This writ must be prepared and engrossed by the attorney or party suing out the same (*x*), and, if necessary, should be settled by counsel, and the name and address of the attorney or party suing it out must be indorsed thereon (*y*). It must be then issued on the Crown side of the Queen's Bench, as other writs, and should be tested on the first day of the term, and made returnable (fifteen days at least after the teste) before the Queen at Westminster, on a day certain in term (*z*). The writ is then delivered to the sheriff of the county in which the defendant resides, and he gives notice of it to the defendant, who must enter an appearance at the Crown office (*a*)

scire facias
on a for-
feited recog-
nizance in
Queen's
Bench.

(*t*) The writ must not be insensible, and there must be no variance between it and the recognizance; 1 Gude, 236; Com. Dig. tit. Pleader, 3 L., 16. See *ante*, Rule 24, p. 290, and Corner's Prac. Append. p. 6.

(*u*) See note to *Rex v. Wilkin*, 2 Car. & P. 11.

(*x*) Rule 2 of the Rules, Orders, and Regulations relating to the Practice of the Crown Side of the Court of Q. B. The following is the rule:—2. "*Issuing Writs*.—Every writ issued on the Crown side of the Court shall be prepared and engrossed by the attorney or party suing out the same, and the name and address of such attorney or party suing out the same, shall be indorsed thereon; and every such writ shall, before the issuing thereof, be sealed with a stamp to be provided for that purpose, and kept at the Crown office; and an entry of every such writ, together with the name and address of the attorney or party issuing the same,

shall be made in a book to be kept at the Crown office for that purpose."

(*y*) *Ibid*.

(*z*) Corner's Prac. 253; 1 Gude, 236; see references to the form, *post*, Append.

(*a*) Rule 16 of the New Regulations of Practice on the Crown side of the Q. B., Corner's Prac. Append. 4. The following is the rule:—"The appearance of every defendant in any prosecution or suit, on the Crown side of the Court, shall be entered in a book to be kept for that purpose at the Crown office, which shall state whether the defendant appears by attorney or in person, and if by attorney, shall specify the name and address of such attorney, and there shall be made in the same book, from time to time, an entry of the several proceedings had and taken in such prosecutions and suits respectively, with the correct dates thereof."

and plead any matter in defence. The sheriff may be ruled to return the writ, as other writs, within four days in London, and eight days in the country (*b*). If the sheriff return *scire feci* to this writ, a four-day rule must be entered on the return of the writ for the defendant to appear and plead (*c*), and in default of appearance and plea, at the expiration of the term, the prosecutor may give the usual ten-day rule, and sign judgment for want of a plea, as in other cases (*d*). If he return *nihil*, an *alias scire facias* must issue, and on *nihil* being returned to the second writ, judgment may be had (*e*).

The *alias scire facias* must lie in the sheriff's office four days (exclusive) before the return, and if the defendants do not appear upon being summoned, and the summons is returned, judgment then goes by default (*f*). The judgment must be entered in the Crown office in the same manner as upon judgment by default on indictment (*g*).

If the defendant plead he may traverse the allegations in the *scire facias*, or plead any special matter which he may deem to be

(*b*) Rule 13 of the New Regulations of Practice on the Crown Side of the Q. B., Corner's Prac. Append. p. 3:—"A side-bar rule to return a writ on the Crown side may be obtained according to former practice, without any actual motion for the same, which shall require such return to be made within four days next after service of such rule, if served in London or Middlesex, and within eight days in all other cases."

(*c*) This rule must be given on or after the return day; and it is questionable whether the rule must not be given, and the time for appearing expire in term, and not in vacation; as it is said, these days must be Court days. Corner's Prac. 254. The following is Rule 17 of the New Regulations of the Crown Practice of the Q. B.:—"One side-bar rule to plead only shall, henceforth, be given in all cases on the Crown side (and it shall not be necessary to give any peremptory rule); such rule shall be drawn up and served as well in term as in vacation, and shall

expire in ten days next after service thereof, except in cases of *quo warranto*, when the same shall expire in eighteen days."

(*d*) 1 Gude, 235; Corner's Prac. p. 254. The following is Rule 19 of the New Regulations of Crown Practice, as to judgment by default:—"In case no plea, replevin, rejoinder, joinder in demurrer, joinder in error, or other pleading, shall be entered on the expiration of the time limited by such rule, judgment as for want of such pleading may be signed at the opening of the office on the next following morning, unless any order of the Court, or of a judge, extending such time, shall have been obtained and served; and, in such case, judgment shall not be signed, until the day after the expiration of the time granted by such order."

(*e*) Corner's Prac. p. 254.

(*f*) Corner's Prac. 254; *Wilson v. Farr*, 4 B. & A. 538.

(*g*) See *ante*, n. (*b*).

an answer to the writ. A four-day rule may then be issued to the prosecutor to reply (*h*). Upon these pleas issue is joined, and the issue is tried in the same way as any other issue joined in the Crown office, except that no proclamation is made at the trial, there being no crime to be tried. If the jury find that the recognizance has been forfeited, they find a verdict for the Crown, and judgment is entered up, and a *fi. fa.* or a *ca. sa.* issued out of the Crown office for the amount of the recognizance; but if to those writs there be a return of *nihil* or *non est*, or if the prosecutor takes no steps on the judgment so signed, the recognizance is estreated into the Exchequer by the Master of the Crown office, in the same way as a recognizance forfeited by the non-appearance of a party to receive judgment, and process on it issues from the Exchequer (*k*).

The issues on the *nisi prius* record are to be drawn from the pleadings, and inserted in the jury process (*l*). The *postea* is returned as in other cases, and on its production at the Crown office, judgment may be marked thereon, in four days next after the return of the *distringas*, or at any subsequent time (*m*).

The statutes 8 & 9 Will. III. c. 11, s. 3, and 3 & 4 Will. IV. c. Costs. 42, relating to costs upon judgment on *scire facias*, do not apply to cases where the Crown is the prosecutor, as they fall within the general rule that no costs are either paid or received by the Crown (*n*).

If the conusor should have paid the amount of his forfeited recognizance, without having taken care to have satisfaction entered on the record, and should be called upon to pay it again, or

When defect of justice remedied by *audita querela*.

(*h*) Rule 18 of New Regulations of Crown Practice.—This rule expires in four days next after service thereof.

(*k*) Notes to *Rex v. Wiblin*, 2 Car. & P. 11; Tidd's Prac. 9th ed. 1093; Corner's Prac. 254.

(*l*) See references, *post*, Append. Nisi Prius Record.

(*m*) The following is Rule 20 of the New Regulations of Crown Practice, as to judgment on verdict:—"In all cases of judgment required to be signed on verdicts given at *nisi prius*, the *postea* shall be produced at the Crown office, and judgment shall in four days next after the return of the *distringas*, or at any subsequent time, be marked

thereon by one of the masters, or the assistant-master, unless a rule shall have been obtained for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment in cases wherein such rules may by the practice of the Court be obtained."

(*n*) *Rex v. Mills*, 7 T. R. 367; Corner's Prac. 254. The prosecutor may obtain his costs in suing out a *scire facias*, on a forfeited recognizance, out of the sum levied on the defendant, under the *levari facias* on motion, as the Queen is only trustee for the party; *Rex v. Eyre and another*, 4 Burr. 2118.

if the conusee have given him a general release, by deed, of all debts, or if he have any good matter of discharge which has happened since the forfeiture, the conusor's remedy is by *audita querela* (or motion) (n), which is in the nature of a bill in equity, to give relief against oppression or defect of justice, where the party aggrieved has a good defence (o). But, if in a *scire facias* on a recognizance, the sheriff return the conusor warned, he shall not have an *audita querela*, although he may have performed the condition, because he had a day in court given him to plead performance of the condition to the *scire facias* (p).

Recognizances by statute.

Recognizances by statute are those founded on the statutes merchant and statutes staple, or which are founded on the 23 Hen. VIII. c. 6, and which are termed *recognizances in the nature of a statute staple*. These recognizances have been termed by Blackstone, in his Commentaries, "of a private kind" (q), and having originally been passed to encourage strangers to trade with us, by giving them a security for their debts more speedy and advantageous than any then known to the law, they could, by the statutes which created them, be put in force against the lands and chattels of the debtor, notwithstanding more than a year had elapsed since they were acknowledged, and although the conusor might have died, without the delay and formality of a *scire facias*.

These recognizances, however, come properly under the head of exceptions to the general rules as to the necessity of issuing a *scire facias* to recover debts of record in certain cases, and they will be found fully treated of in the chapter on those exceptions (r).

(n) *Lester v. Mundell*, 1 Bos. & P. 428; *Snook v. Mattock*, 5 Ad. & El. 245; *Mitford v. Cordwell*, 2 Stra. 1198.

(o) See notes to *Turner v. Davies*, 2 Wms. Saund. 6th ed. 147; Com. Dig. tit. *Audita Querela*, D; F. N. B. 102, H; Bac. Abr. tit. *Audita Querela* 3 Bla.; Com. 406; *Oguel v. Ran-*

dal, Cro. Jac. 29; Keilw. 25.

(p) *Wickett v. Creamer*, 1 Salk. 264. See a recent instance of the writ of *audita querela*, *Giles v. Hutt and another*, 1 Exch. 59; 3 Exch. 18.

(q) 2 Bla. Com. 341.

(r) See *ante*, book i. ch. vii. For reference to the forms relating to the subject of the chapter, see *post*, Append.

CHAPTER IV.

SCIRE FACIAS ON RECOGNIZANCE OF SPECIAL BAIL.

The old Practice as to putting in Bail to an Action, p. 303.

The Bail below, p. 304.

Special Bail or Bail above, p. 304.

Entering Bail Piece on the Roll, and docketing it, p. 304.

Proceedings on Forfeited Recognizance by Scire Facias, p. 305.

How far the Practice altered by the 1 & 2 Vict. c. 110, p. 305.

Old Practice, how far retained, p. 306.

Form of the Recognizance of Bail, p. 307.

What Circumstances will exonerate the Bail, p. 307.

1. *Payment of Debt and Costs*, p. 307.

2. *If the Principal die before the Return of a Ca. Sa. against him*, p. 308.

3. *If the Principal become Bankrupt and obtain his Certificate before the Bail are fixed*, p. 308.

4. *If the Principal obtain his Discharge as an Insolvent before the Bail are fixed*, p. 309.

5. *Rendering the Principal*, p. 309.

6. *Variance in the Declaration from the Affidavit to hold to Bail*, p. 310.

7. *Discharge of Bail by giving time to Principal*, p. 311.

8. *Where the Position of the Defendant has been altered from what it was when the Bail entered into their Recognizance; or where the Condition of the Recognizance has not been broken*, p. 312.

Proceedings by Scire Facias against the Bail, p. 313.

Suing out Ca. Sa. against Principal, p. 313.

Proceedings on the Ca. Sa. p. 314.

The Sheriff's Return of non est inventus, p. 315.

Ca. Sa. for Residue of Debt, p. 316.

Form of Entry of Recognizance, p. 316.

Form of Scire Facias, p. 316.

When Scire Facias may be sued out, p. 317.

When Returnable, p. 317.

Amendment of Scire Facias, p. 318.

Signing Judgment on Scire Facias, p. 318.

Rule to appear, p. 319.

Setting aside Judge's Order for Judgment, p. 319.

Scire Facias must issue within Twenty Years, p. 319.

BEFORE the passing of the 1 & 2 Vict. c. 110, in all actions of debt (a), and in all actions of *assumpsit* where the damages sounded in debt (b), and where the cause of action exceeded

The old practice as to putting in bail to an action.

(a) 1 Chitty's Arch. Prac. 8th ed. 649.

(b) *Ibid.* 648.

The bail below.

Special bail or bail above.

Entering bail piece on the roll, and docketing it.

20*l.* (c), the defendant (unless privileged from arrest) might have been arrested; and the rule then was "that whenever the defendant might be arrested, he might be holden to special bail" (d). The practice then was, upon the arrest of a defendant, to compel him either to deposit with the sheriff's officer the amount of the debt indorsed upon the writ—together with 10*l.* to answer the costs (e), or to give bail to the sheriff either for his appearance at the return of the writ, or that he would surrender himself to the sheriff (f); and, also, that he would put in and perfect special bail to the action, otherwise he was detained in custody. The bail to the sheriff was called the *bail below*, or *common bail* (g); and if these conditions of the bail bond were not complied with, the sheriff might bring his action on the bail bond to recover the penalty, which was always the sum indorsed on the writ (h), or assign it to the plaintiff in the action to do so. After putting in common bail, the defendant was then called upon, either to deposit a further sum of 10*l.* to answer the costs, which was to be paid into Court to abide the event of the suit (i), or to put in and perfect *special bail* to the action, which was called the *bail above* (k). The *bail above*, who were two or more responsible persons, entered into a recognizance with the plaintiff, before a judge or commissioner duly authorized (l), for double the amount of the debt sworn to, or for 1000*l.* beyond the debt when it exceeded 1000*l.* (m); that if the verdict should be against the defendant, he should satisfy the plaintiff his debt and costs, or render himself into custody, or that they would do it for him (n). This recognizance or *bail piece* (as it is called) having been filed in the Master's office, or at the Judge's chambers of the Court where the action was brought according to the practice of the Court (o), was entered on a roll called the recognizance roll and docketed, and the roll was carried into the Treasury Chamber (p), where it was deposited as a record of the Court. If the defendant failed to pay the debt and costs in the action, or did not render himself into custody, the plaintiff might then proceed against the bail on their

(c) 7 & 8 Geo. IV. c. 7.

(d) 1 Tidd's Prac. 8th ed. 240.

(e) 1 Chitty's Arch. 8th ed. 707;
43 Geo. III. c. 46, s. 2.

(f) *Jones v. Lander*, 6 T. R. 753;
Slamper v. Melbourne, 7 T. R. 122.

(g) 1 Tidd's Prac. 8th ed. 245.

(h) 12 Geo. I. c. 23, s. 2.

(i) 1 Chitty's Arch. 8th ed. 774;

7 & 8 Geo. IV. c. 71, s. 1.

(k) 2 Tidd's Prac. 8th ed. 245.

(l) 4 & 5 Will. & Mary, c. 4,
s. 1.

(m) 2 Tidd's Prac. 8th ed. 246.

(n) 1 Chitty's Arch. 8th ed. 734.

(o) *Ibid.* 770, 800.

(p) 2 Tidd's Prac. 8th ed. 279;
1 Chitty's Arch. 8th ed. 801.

forfeited recognizance to recover the debt and costs from them; and the mode of proceeding was, either by issuing a *scire facias* on the recognizance, or by action of debt (q). Proceeding on forfeited recognizance by *scire facias*.

The 1 & 2 Vict. c. 110, has, with one or two exceptions of rare occurrence, abolished this practice. The existence however of those exceptions, compels an occasional recurrence to the old practice; and, in such cases, it may become necessary to proceed by *scire facias* against the bail on their forfeited recognizance. The present chapter will treat of the writ of *scire facias* in those cases. How far this practice altered by the 1 & 2 Vict. c. 110.

The 1st sect. of the 1 & 2 Vict. c. 110, enacts, "That from and after the time appointed for the commencement of this Act, no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever; or (except in the cases, and in the manner hereinafter provided for) in any superior Court."

Sect. 2 enacts, "That all personal actions in her Majesty's superior Courts of law at Westminster, shall be commenced by writ of summons."

Sect. 3 enacts, "That if the plaintiff in any action in any of her Majesty's superior Courts of law at Westminster, in which the defendant is now liable to arrest, whether upon the order of a judge, or without such order, shall by the affidavit of himself, or of some other person, show to the satisfaction of a judge of one of the superior Courts, that such plaintiff has a cause of action against the defendant or defendants, to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that *there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England, unless he or they be forthwith apprehended*, it shall be lawful for such judge, by a special order to direct that such defendant or defendants so about to quit England, *shall be held to bail* for such sum as such judge shall think fit, not exceeding the amount of the debt or damages; and therefore it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this Act annexed, and shall bear date on the day on which the same shall be issued."

Sect. 4 enacts, "That the sheriff or other officer to whom any such writ of *capias* shall be directed, shall within one calendar

month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior Courts: and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court, instead of putting in and perfecting special bail, shall be according to the like practice of the said superior Courts, or as near thereto as the circumstances of the case will admit.

Sect. 5 enacts, "That any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith."

Sect. 85 enacts, "That in all cases where it shall have been adjudged that any such [insolvent] prisoner shall be so [conditionally] discharged [from custody], and so entitled as aforesaid [to the benefit of the Act] at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his or her creditors, with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not passed."

Old practice, how far retained.

Under the 3rd section of this statute, therefore, a debtor may be arrested, if his debt exceed 20*l.*, and he be not privileged from arrest, provided the creditor can, by affidavit, satisfy a judge—whether before or after the commencement of an action for the recovery of the debt (*r*)—"that there is probable cause for believing that the debtor is about to quit England, unless he be forthwith apprehended" (*s*); and he must put in and perfect special bail as near to the former practice as the circumstances of the case will admit. And under the 85th section, if an insolvent

(*r*) Sect. 5, *ante*.

(*s*) The affidavit for this purpose, must set forth the circumstances, in order that the judge may determine whether there is such probable cause; *Bateman v. Dunn*, 7 Dowl. 105; *Har-*

vey v. O'Meara, 7 Dowl. 725. The application for the order must be made to a judge, and not to the Court; *Bentley v. Berry*, 7 M. & W. 146; *Barnet v. Craw*, 1 Dowl. N. S. 774. And see 2 Wms. Saund. 68, n. (b).

has been adjudged to be discharged at some future period from his debts, he may be detained in prison, or be arrested by a creditor before such period has arrived, on an affidavit to hold to bail, "in the same manner as he would have been subject and liable to if this Act had not passed" (t).

It would be foreign to the subject of this work to enter into a minute detail of the practice of obtaining a judge's order for the arrest of a debtor under the third section of this Act, and of putting in and perfecting special bail. For the practice in these respects the reader is referred to the very excellent existing books of practice (u). It is sufficient here to state, that in these cases, as before the statute, a debtor may be compelled to find bail, who must enter into their recognizances, generally, or in the Common Pleas, in a sum certain, that if the debtor be condemned in the action, he shall satisfy the costs and condemnation money (or in the Common Pleas pay the condemnation money), or render himself to the custody of the Keeper of the Queen's prison, or that they will do it for him (x).

Form of the
recogni-
zance of
bail.

The liability of bail who have entered into this recognizance, is governed by a general rule of all the Courts, of H. T. 2 Will IV. r. 21, which provides that, "bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance," that is, not exceeding double the amount of the sum sworn to, and they are together liable only to this amount (y).

When persons have become bail, and have bound themselves by their recognizance under either of these provisions of the statute of Victoria, it becomes necessary to ascertain what circumstances will exonerate them from their liability, before proceedings can be safely commenced against them: and those circumstances which will exonerate them, may of course be pleaded in bar to any action of *scire facias* against them on their recognizance.

What cir-
cumstances
will exoner-
ate the bail.

First, on payment of the sum sworn to, and mentioned in the judge's order and costs, not exceeding the amount of the recognizance, the bail are entitled to have an *exoneretur* entered upon

1. Payment
of the debt
and costs.

(t) *Turner v. Darnell*, 5 M. & W. 28; *Growcock v. Waller*, 11 Ad. & Ell. 165; *Belton v. Clapperton*, 9 M. & W. 473.

(u) See 1 Chitty's Arch. Prac. 8th ed. 629, *et seq.*; 1 Tidd's Prac. 8th ed. 238, *et seq.* And see 2 Wms. Saund. 6th ed. p. 68, n. (b).

(x) 1 Chitty's Arch. Prac. 734, 8th ed.; *Sandon v. Proctor*, 7 B. & C. 800; *Appesley v. Ive*, Cro. Jac. 645; *Scuth v. Griffith*, Cro. Car. 482; *Shuttle v. Wood*, 2 Salk. 564 2 Wms. Saund. 6th ed. 71 d.

(y) 1 Chitty's Arch. Prac. 779, 8th ed.

the bail-piece; and the Court or a judge will stay proceedings against them upon it (z), although the sum sworn to and mentioned in the order is less than the amount of damages actually recovered against the defendant (a). Or upon such *exoneretur* being entered, the bail may plead payment of record, as performance of the recognizance (b). But unless satisfaction be entered on the record, payment cannot be pleaded (c).

If, however, a *scire facias* have been issued against them, they are liable to the costs of the *scire facias* in addition to the extent of their recognizance, and, since the 3 & 4 Will. IV. c. 42, s. 34, whether they have pleaded to it or not. In the same manner they are liable to the costs of an action of debt against them, in addition to the costs of the original action against their principal (d).

Secondly, if the principal die at any time before the return of a *ca. sa.* against him, the bail are thereby discharged, and they may apply to the Court, or to a judge at chambers in vacation, to have an *exoneretur* entered on the bail piece; or they may plead the death to an action of debt or *scire facias* on the recognizance (e), for they have time till the return of the *capias* to render him (e).

Thirdly, if the principal become bankrupt, and obtain his certificate *before* the bail are fixed, in all cases where the certificate is a bar, the bail are thereby discharged (f), and they should apply to the Court, or to a judge at chambers in vacation, to have an *exoneretur* entered on the bail piece (g). So if a creditor prove his debt under the fiat, he cannot afterwards proceed against the bail (h).

2. If the principal die before the return of a *ca. sa.* against him.

3. If the principal become bankrupt and obtain his certificate before the bail are fixed.

(z) *Clarke v. Bradshaw*, 1 East, 86, 91, n.; *Jacobs v. Bowes*, 6 East, 312.

(a) *Clarke v. Bradshaw*, 1 East 91; *Coles v. De Hayne*, 6 T. R. 216.

(b) *Brunkhorne's case*, Cro. Eliz. 233.

(c) *Ordway v. Parrett and another*, Cro. Eliz. 132; Vent. 49, 262; 2 Lev. 212; *Wilmore z. Clerk and another*, 1 Ld. Raym. 157, 216.

(d) *R. v. Lyon*, 3 Burr. 1461; *Perriga v. Mellish*, 5 T. R. 363; *Hughes v. Pardevin*, 15 East, 254; *Abbott v. Rawley*, 3 B. & P. 13; 1 Chitty's Arch. 8th ed. 780.

(e) *Sparrow v. Lowgate*, W. Jon.

29; *Warter v. Perry and another*, Cro. Eliz. 199; Tidd's Prac. 9th ed. 1129; *Barney's case*, 3 Salk. 57; *Anon.* 12 Mod. 601; *Williams v. Vaughan*, Cro. Jac. 97; Chitty's Arch. Prac. 8th ed. 781.

(f) *Woolley v. Cobbe*, 1 Burr. 244; *Manning v. Partridge and another*, 14 East, 599; *Johnson v. Lindsay*, 1 B. & C. 247. And see *Kinnear v. Tarrant*, 15 East, 622.

(g) *Martin v. O'Hara*, Cowp. 824; *Donnelly v. Dunn*, 2 B. & P. 45; 1 Chitty's Arch. Prac. 8th ed. 782.

(h) *Duncan v. Scott*, 1 Bing. N. C. 431; *Duncan v. Sutton*, 1 Scott, 338.

Fourthly, if the principal be discharged under an insolvent act before his bail are fixed, the bail may apply in the same manner as if he had become a bankrupt, and had obtained his certificate, to have an *exoneretur* entered on the bail piece (i).

4. If the principal obtain his discharge as an insolvent before the bail are fixed.

Fifthly, the bail may, *ex debito justitiæ*, wholly discharge themselves either before or after judgment in the action, at any time before the return of a *ca. sa.*, by rendering their principal; and they may plead this render to a *scire facias* or action of debt on their recognizance (k). If the plaintiff proceed against the bail by *scire facias*, the bail have until and upon the return day of the *scire facias* to render their principal, if the sheriff return *scire feci*, or it seems until and upon the eighth day after the return to the *scire facias* when the return has been *nihil* (l). Formerly if the render were made after action brought on the last of the days limited for it, it must have been made before the Court rose (m); but now, by a rule of all the Courts, R. H. 2 Will. 4, r. 22, "bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night." But if, from any act of law of our own state, it becomes impossible to render the principal, the Court, or a judge at chambers, upon application, will at once order an *exoneretur* to be entered on the bail piece (n); or if he be in criminal custody, will enlarge the time for rendering him; or the Court of Queen's Bench, on motion, will grant a *habeas corpus* to bring him up in order to render him (o). The principal, if not in custody, may be arrested and rendered to the

5. Rendering the principal.

(i) *Anon. v. Bruce*, 2 Chitty's Rep. 105; *Shakespeare v. Phillips*, 8 East, 433; 1 Chitty's Arch. Prac. 8th ed. 7r2.

(k) *Wilmore v. Clerk and Howard*, 1 Ld. Raym. 156; 1 Chitty's Arch. Prac. 8th ed. 783; Bac. Abr. tit. Scire Facias, C, 7; Moore, 888; Leon. 58; 2 Bulst. 260.

(l) *Armitage v. Rigby*, 5 Ad. & El. 82; *Anon.* 8 Mod. 340; and if the principal render himself after the second *scire facias* awarded, and before judgment thereon, the bail will be discharged; *Walmsley v. Howard*, Cro. Eliz. 618; *Aylson v. Byston*, Cro. Eliz. 738. And see *Goodwin v. Hilton*, 7 Mod. 77.

(m) *Lardner v. Bassage*, 2 H. Bla. 583; *Simmons v. Middleton*, 1 Wils. 270; *Webb v. Harvey*, 2 T. R. 757; *Clarke v. Bradshaw*, 1 East, 86; *Stevenson v. Maloney*, 1 Alc. & Na. 225 (Irish).

(n) See notes in 13 Price, 525, 532; 1 Chitty's Arch. Prac. 784, 8th ed.; *Falkin v. Critico*, 13 East, 457; *Wood v. Mitchell*, 6 T. R. 247; *Fowler v. Dunn*, 4 Burr. 2034.

(o) *Sharp v. Sheriff*, 7 T. R. 226; *Daniel v. Thompson*, 15 East, 78; *Currie v. Kenwar*, 1 B. & B. 23; *Gibson v. White*, 1 Dowl. 297; *Waugh v. Ashford*, 3 Dowl. 128; *Harris v. Alcock*, 2 Crom. & Jerv. 486; *Campbell v. Ackland*, 1 Dowl. 635.

Queen's prison, or to the gaol of the county wherein he was arrested, a judge's order for that purpose having been obtained and lodged with the gaoler, and a written notice of the lodging of such order having been sent to the plaintiff's attorney; and the bail are thereupon wholly exonerated from liability (g).

6. Variance in the declaration from the affidavit to hold to bail.

Sixthly, the bail will be discharged if the declaration in the action varies from the affidavit to hold to bail (r); and so if the declaration varies from the affidavit in the character in which the plaintiff sues, or the defendant is sued (s), the defendant or his bail can apply to the Court for relief; but if the affidavit of debt and writ state the debt to be due to the plaintiff, executor of a deceased person, and not as executor of, and the declaration be general, stating the debt to be due to him in his own right, this will be no variance (t). The rule is, that when the process is general the declaration may be particular, and the plaintiff may declare *qui tam* or in *autre droit* (u). So any variance in the number of the plaintiffs or defendants (x), or in the name of the plaintiff or defendant, unless the bail have waived the objection, will discharge the bail (y). So where the affidavit of debt discloses a joint cause of action the Court will not allow the plaintiff to proceed separately against the defendants, and the declaration will be irregular (z), and the bail, it seems, will be discharged, for the bail of each defendant in actions *ex contractu* against several only undertake for a joint claim recoverable in the action against all the defendants, and not for a separate claim against their principal (a). So if the plaintiff declare for a different cause of action from that mentioned in the affidavit, to hold to bail, he thereby discharges the bail *in toto* (b). In these cases the bail will be discharged of their liability, and the Court or a judge, upon application, will order an *exoneretur* to be entered on the

(g) 11 Geo. IV. & 1 Will. IV. c.

70, s. 21; and 5 & 6 Vict. c. 22.

See as to the practice, 1 Chitty's Arch. Prac. 8th ed. 786, *et seq.*

(r) *Teltherrington v. Goulding*, 7 T. R. 80; *Wilkes v. Adcock*, 8 T. R. 27.

(s) *Marzetti v. Comte de Jouffroy*, 1 Dowl. 44.

(t) *Anon.* 1 Dowl. 97.

(u) Tidd's Prac. 9th ed. 450, 147; *Isley, Executor, v. Isley*, 1 Dowl. 310; *Spalding v. Mure*, 6 T. R. 363; *Stables v. Ashley*, 1 B. & P. 49; *Chapman v. Eland*, 2 N. R. 82; *Manstey v. Stephens*,

9 Bing. 310.

(x) *Spalding v. Mure*, 6 T. R. 363; *Forbes v. Phillips*, 2 N. R. 98; *Rogers v. Jenkins*, 1 B. & P. 383.

(y) *Grindall v. Smith*, 1 M. & P. 24; *Clark v. Baker*, 13 East; 1 Chitty's Arch. Prac. 8th ed. 663—699.

(z) *Carson v. Dowding*, 4 Dowl. 297.

(a) *Thompson v. Cotter*, 1 M. & S. 55; 1 Chitty's Arch. Prac. 8th ed. 793.

(b) 2 Saund. 72 a. But see *Taylor v. Wilkinson*, 3 Ad. & Ell. 784.

bail piece, and will not allow the declaration to be amended so as to recharge the bail with their liability (c). Where in an action commenced before the 1 & 2 Vict. c. 110, the plaintiff brought *scire facias* on a recognizance of bail for the recovery of the amount of a verdict taken generally on several counts, one of which was in conformity with the affidavit of debt, and the others not, Coleridge, J., stayed the proceedings in *scire facias*, it not being shown to him that any evidence was given at the trial that any certain sum of money was due upon the former count (d), on the ground that the plaintiff was seeking to recover from the bail something for which they had never made themselves responsible under the bail bond. An objection of this kind must be taken advantage of by application to the Court or a judge to have an *exoneretur* entered on the bail piece, or to relieve the bail from any excess, and cannot be taken advantage of by plea to the *scire facias* on the recognizance (e). The declaration in *scire facias* must correctly set out the recognizance, or upon *nul tiel record* pleaded the variance will be fatal (f). And such variance cannot be amended after the defendant has pleaded *nul tiel record*, for there may be a recognizance that agrees with it (g).

Seventhly, the bail may be discharged from their liability by any time being given or indulgence shown to the principal without their consent, or the consent of one of them (h), by which they are put in a different situation from that in which they placed themselves by entering into the recognizance. As if the principal give a *cognovit* to the plaintiff, by which he has longer time given to him for the payment of the debt and costs than if he had had judgment against him by the ordinary course of trial in the action (i). So if, without notice to the bail, the plaintiff take the joint bills of the defendant and another person for his debt and costs (k), or agree to take a composition for his debt and costs (l). The application by the bail for relief on the ground of time having

7. Discharge of bail by giving time to the principal.

(c) *Levet v. Kibblewhite*, 6 Taunt. 483; *Gent v. Abbott*, 8 Taunt. 304; 1 Chitty's Arch. Prac. 8th ed. 794.

(d) *Firth v. Harris*, 8 Dowl. 689; and see *Wheehright v. Jutting*, 7 Taunt. 304; *Knight v. Dorsey*, 1 B. & B. 48.

(e) *Taylor v. Wilkinson*, 5 Nev. & M. 189; S. C., 3 Ad. & El. 784; *Ward v. Tremmon*, 4 Nev. & M. 876.

(f) *Shuttle v. Wood*, 2 Salk. 564, 600, 659; S. C., 6 Mod. 42; 2 Wms. Saund. 6th ed. 72 b; and see *Cooper v.*

Pennefather, 7 C. B. 739.

(g) *Bucksom v. Hoskins*, 1 Salk. 52; 2 Wms. Saund. 6th ed. 72 b.

(h) *Howard v. Bradbury*, 3 Dowl. 92.

(i) *Thomas v. Young*, 15 East, 617; *Stevenson v. Roche*, 9 B. & C. 711; *Bowfield v. Tower*, 4 Taunt. 456; *Charleton v. Morris*, 6 Bing. 427; 1 Chitty's Arch. Prac. 8th ed. 795.

(k) *Willeson v. Whittaker*, 7 Taunt. 53; *Vernon v. Thurley*, 4 Dowl. 660.

(l) *Thackeray v. Whittaker*, 8 Taunt.

been given to the principal, should always be made in a reasonable time after the bail knew of the agreement to give time (m).

s. Where the position of the defendant has been altered from what it was when the bail entered into their recognizance, or where the condition of the recognizance has not been broken.

Eighthly, the bail may be discharged by a variety of circumstances which have altered the position of the defendant from what it was when they entered into their recognizance (m), or whereby the condition of the recognizance is not broken. As, if the cause be referred to arbitration, unless a verdict be taken for the plaintiff's security (o); or if no judgment be obtained against the principal (p); or if the principal pay the debt and costs; or if the plaintiff execute a release to the principal and bail of all debts, judgments, and executions, such release may be pleaded in bar (q); or if the principal be taken on a writ of *ca. sa.* (r); or if the plaintiff sue out an *elegit*, and extend lands under it, or sue out a *fi. fa.*, and levy the whole amount of his debt under it (s). So if the bail have not justified, and have had their names struck out of the bail piece (t). So if the defendant become a peer, because it is no longer in the power of the bail to surrender the principal (u); or a member of the House of Commons, as the bail are entitled to be relieved where the principal, if surrendered, would have been entitled to have been discharged, if in custody, after final judgment (x); and the Court or a judge in such cases will allow an *exoneretur* to be entered. So if from any act or law of our own state it become impossible to render the defendant, as if he be actually on board a convict ship, in order to be transported (y); or a seaman impressed in the Queen's ser-

28; *Brickwood v. Anvis*, 5 Taunt. 614.

(m) *Vernon v. Thurley*, 4 Dowl. 664, *per Parke, B.*, *Knight v. Dorney*, 1 B. & B. 48; 1 Chitty's Arch. Prac. 8th ed. 796.

(n) *Taylor v. Wilkinson*, 3 Ad. & El. 784.

(o) 2 Saund. 72 b; *Archer v. Hale*, 1 M. & P. 285; 4 Bing. 464, S. C.

(p) 1 Chitty's Arch. Prac. 8th. ed. 797.

(q) *Harrison v. Hucksley and another*, Cro. Jac. 401; and see *Blofield v. Grymes*, Cro. Eliz. 690.

(r) *Higgins' case*, Cro. Jac. 320. "If the principal be in execution the plaintiff cannot take the bail." *Gee v. Fane*, 1 Lev. 226.

(s) *Gubbs v. Blackwell*, 2 Lut. 1273;

Stevenson v. Roche, 9 B. & C. 707.

(t) *Humphry v. Leite*, 4 Burr. 2107;

Jones v. Tub, 1 Wils. 337.

(u) *Trinder v. Shirley*, 1 Doug. 45; and see stat. 10 Geo. III. c. 50, s. 2.

(x) *Langridge v. Flood*, 4 East, 190, n; *Phillips v. Willesey*, 1 Dowl. 9; *Shewys, Executor, v. Chamond*, 1 Dy. 60 a; *Holiday v. Pitt*, 2 Stra. 985; 1 Tidd's Prac. 9th ed. 290. And see, as to the duration of the privilege, *Goudy v. Duncombe*, 1 Exch. 430; and *Cassidy v. Stewart*, 2 M. & Cr. 465, 466.

(y) *Wood v. Mitchell*, 6 T. R. 247; *Fowler v. Dunn*, 4 Burr. 2034; *Fergens' Bail*, 2 Stra. 1217; *Sharp v. Sheriff*, 7 T. R. 226; *Grant v. Fagan*, 4 East, 190; *ante*, p. 308, n. (n).

vice (z); or an alien sent out of the kingdom under the Alien Act (a), the Court or a judge will allow an *exoneretur* to be entered on the bail piece (b). So if the plaintiff be an alien enemy this is a good plea by bail to a *scire facias* (c).

After an *exoneretur* has been ordered to be entered on the bail piece, any proceedings against the bail will be irregular (d).

If the principal after judgment against him neither pay the condemnation money, nor surrender himself to prison, a *scire facias* lies against the bail (e): but it seems to be clearly settled, that no proceedings, either by *scire facias* or action of debt, can be had against the bail upon their recognizance before a *capias ad satisfaciendum* is taken out against the principal, and returned *non est inventus*; for the bail are not bound to render the principal, until they know by the plaintiff's suing out the writ of *ca. sa.* that he means to proceed against the person of the defendant (f). For the purpose of affording the bail this information, the writ must be entered in the book kept in the sheriff's office for that purpose; otherwise, the Court will set aside any proceedings that may be had against the bail (g). It is therefore the duty of the bail to search the sheriff's office to know whether any *ca. sa.* is left there (h). The *ca. sa.*, if regularly sued out and returned, may be filed at any time, the filing being mere matter of form (i). So that if the principal should die after the return of the *ca. sa.*, and before the return is filed, the bail are fixed, and the Court will not stay the filing of the return (k). And the bail are liable if the defendant should die after the return of the *ca. sa.*, and before taking out a writ of *scire facias*; or if he should die between the

Proceed-
ings by
scire facias
against the
bail.

Suing out
ca. sa.
against
principal.

(z) *Robertson v. Patterson*, 7 East, 405.

(a) *Folkein v. Critico*, 13 East, 457.

(b) See notes in 13 Price, 525, 532.

(c) *O'Mealey v. Wilson and another*, 1 Camp. 482.

(d) *Bond v. Isaac*, 1 Burr. 409.
"Even if not actually entered on the bail piece."

(e) *Sparke v. Cole*, 2 Lut. 1262; *Baxter v. Peach*, *ibid.* 1279; 2 Wms. Saund. 6th ed 71 d; Com. Dig. tit. Bail, R. 1.

(f) 2 Wms. Saund. 6th ed. 71 d; 2 Tidd's Prac. 8th ed. 1147; 1 Chitty's Arch. Prac. 8th ed. 798; Bac. Abr. tit. Scire Facias, C, 7; *Sparrow v.*

Sowgate, Sir W. Jones, 29; *Calf v. Dingley*, *ibid.* 138; *South v. Griffith*, Cro. Car. 481; *Barcock v. Thompson*, Sty. 281; *Ibid.* 288, 323; *Sparkes v. Coke*, 2 Lut. 1273; *Wehware v. Clerk*, 1 Ld. Raym. 156; *Weddall v. Jocar*, 10 Mod. 267; *Thackray v. Harris*, 1 B. & Ald. 212.

(g) *Hutton v. Reuben*, 5 M. & Sel. 323; 2 Chitty's Rep. 102, S. C.

(h) *Hunt v. Coxe*, 3 Burr. 1360.

(i) *Gee v. Fane*, 1 Lev. 225; *Hunt v. Coxe*, 3 Burr. 1360; *Rawlinson v. Gunston*, 6 T. R. 284; 2 Tidd's Prac. 8th ed. 1148

(k) *Rawlinson v. Gunston*, 6 T. R. 284.

return of the *ca. sa.*, and the return of the second *scire facias* (*l*). The sheriff's return of *non est inventus* is good, though the plaintiff knew where to find the defendant (*m*); but if the defendant be already in custody of the sheriff, he cannot return *non est inventus* (*n*). If no *ca. sa.* be actually sued out and returned, and an action of debt or a *scire facias* be brought against the bail, the bail may plead this matter; but the Court it seems will not quash the *scire facias*, or stay the proceedings on motion (*o*).

Proceed-
ings on the
ca. sa.

The *ca. sa.* against the principal should be directed to the sheriff of the county where the action was laid (*p*); and it may be tested on the day on which it was issued (*q*), and should be made returnable on some day in the term in which it issues, or in the following term (*r*); or it may be tested of the previous term, if the defendant consent at the trial that the judgment should be as of the previous term (*s*). There must be eight days between the teste and the return in the Common Pleas (*t*); in the other Courts it is safer to adhere to the old practice, and to have fifteen days between the teste and the return (*u*). The reason assigned for allowing this time between the teste and the return is, that bail may have convenient time to seek the principal (*x*). The bail may take advantage by motion, of any irregularities, as to the proceedings on the *ca. sa.*; as if it be made returnable before it issued, or if it have been issued into a wrong county (*y*); provided the motion be made within a reasonable time (*z*). If the *ca. sa.* be not sued out within a year after judgment has been signed, the judgment itself must be revived by *scire facias* (as it is then presumed to have been satisfied, unless revived (*a*),) before any pro-

(*l*) *Barry v. Barry*, 2 Stra.; 2 Ld. Raym. 1452, *S. C.*; *Glyn v. Yates*, 1 Stra. 511.

(*m*) 2 Tidd's Prac. 8th ed. 1147, citing *Sillitoe v. Wallace*, MS.; 2 Wms. Saund. 6th ed. 71 *e*.

(*n*) *Ibid.* citing *Forayth v. Marriott*, 1 N. R. 251; *Burkes v. Maine*, 15 East, 2; *Ward v. Brumfit*, 2 M. & S. 238; *Briggs v. Richardson*, 2 Dowl. 158.

(*o*) *Philpot v. Manuel*, 5 D & R. 615; R. E. 5 Geo. II. r. 3; 1 Chitty's Arch. Prac. 8th ed. 798.

(*p*) 2 Wms. Saund. 6th ed. 72; *Galway v. Laporte*, 2 Bing. N. C. 456; 4 Dowl. 639.

(*q*) 3 & 4 Will. IV. c. 67, s. 2; 1 Chitty's Arch. Prac. 8th ed. 798.

(*r*) 1 Chitty's Arch. Prac. 8th ed. 799.

(*s*) *Hovenden v. Crowther*, 1 Dowl. 170.

(*t*) *Kymer v. Sydserf*, 5 Scott, N. R. 193.

(*u*) 1 Chitty's Arch. Prac. 8th ed. 799; *Bull v. Russell*, 1 Salk. 602; 2 Wms. Saund. 6th ed. 72.

(*x*) *Alyson v. Byston*, Cro. Eliz. 738.

(*y*) *La Porte's Bail*, 4 Dowl. 639; 2 Bing. N. C. 456, *S. C.*

(*z*) *Pocock v. Cockerton*, 7 Dowl. 21.

(*a*) See *ante*, book i. ch. ii.

ceedings can be had against the bail: proceeding in such a case, without a *scire facias* to revive the judgment, would be an irregularity; and, on application to the Court by the bail, the writ of *ca. sa.* might be set aside (*b*).

The *ca. sa.* must lie the last four days before the return (exclusive of the day of lodging it and of the return day) in the sheriff's office (*c*), otherwise the proceedings will be irregular (*d*). But the irregularity cannot be taken advantage of by plea (*e*). These days must be searching days, Sundays and non-judicial days not being reckoned, even although the last of the four days (*f*). In London and Middlesex the *ca. sa.* must also be entered four clear days in the public book kept at the sheriff's office for that purpose (*g*).

The *ca. sa.* being intended merely as a notice to the bail of the plaintiff's intention to proceed against them, the sheriff returns *non est inventus* as a matter of course, without making any attempt to arrest the defendant (*h*). But if the defendant be already in custody of the sheriff, and the plaintiff knew it, although in another suit, and by a different name, it will be irregular in the sheriff to make this return, or for the plaintiff to procure it to be made, and the proceedings against the bail will be set aside on that ground (*i*). If a writ of error have been sued out, and notice of it given to the plaintiff, he cannot issue a *ca. sa.* to fix the bail without the leave of the Court or a judge (*k*).

The sheriff's
return of
non est in-
ventus.

(*b*) See *Blanchenay v. Burt*, 4 Q. B. 710; *Gawler v. Tally*, 1 H. Bla. 74; *Mortimer v. Pigott*, 2 Dowl. 615; *La Porte's Bail*, 4 Dowl. 639; and see *Cholmondeley v. Bealing*, 2 Ld. Raym. 1096. *Per* Powell, J.—“Because they cannot take advantage of an error in a collateral action.” 6 Mod. 304; *Holt*, 90, S. C.; *Campbell v. Cumming*, 2 Burr. 1187; 1 Chitty's Arch. Prac. 8th ed. 799; *Haywood v. Ribbans*, 4 East, 310.

(*c*) R. E. 5 Geo. II. r. 3; *Anon* 2 Salk. 599; 2 Saund. 72 *b*; 1 Chitty's Arch. Prac. 8th ed. 799; *Sandon v. Proctor*, 7 B. & C. 800.

(*d*) *Cock v. Brockhurst*, 13 East, 588; *Furnell v. Smith*, 7 B. & C. 693; *Wilson v. Farr*, 4 B. & Ald. 537; *Howard v. Smith*, 1 B. & A. 528.

(*e*) *Sandon v. Proctor and another*,

7 B. & C. 800.

(*f*) *Scott v. Larkins*, 7 Bing. 109; 4 Moo. & P. 748; 1 Dowl. 200; S. C., 7 B. & C. 800; *Armitage v. Rigbye*, 5 Ad. & El. 76; *Goodwin v. Lugar*, 6 M. & Sel. 133.

(*g*) R. H. 2 Will. IV. r. 77; *Hutton v. Reuben*, 5 M. & S. 323; 2 Chitty's Rep. 102, S. C.

(*h*) *Hunt v. Cox*, 3 Burr. 1360.

(*i*) *Ward v. Brumfit and another*, 2 M. & S. 238; *Briggs v. Richardson*, 2 Dowl. 158; *Sanderson v. Parker*, 9 Dowl. 495.

(*k*) *Temple v. Turner*, 6 M. & W. 152; 8 Dowl. 246, S. C.; *Levy v. Price*, 2 M. & W. 583; *Knight v. Thynne*, 9 Dowl. 964; *Gibbs v. Trevannian*, 8 Dowl. 140; *Tidd*, 9th ed. 1154; 1 Chitty's Arch. Prac. 8th ed. 519.

Ca. sa. for
residue of
debt.

A *ca. sa.* may be issued for the residue of the debt after a part has already been recovered under a *fi. fa.*, and the same rules apply as to fixing the bail for the residue of the debt (*l*).

Before a *scire facias* is sued out against the bail upon the recognizance, the bail piece ought to be filed, and an entry be made of the recognizance on a roll, and docketed (*m*). This, however, may be done at any time before the bail are called upon to plead; but if it be not done they may plead *nul tiel record*; and if the roll be carried in afterwards they may withdraw their plea, and the plaintiff will have the costs of the plea to pay (*n*). In the Queen's Bench the recognizance is not a record till entered. In the Common Pleas it is a record immediately upon the first caption, and binds the lands before it is filed at Westminster (*o*).

Form of
entry of re-
cognizance.

The form of entry of the recognizance in all the Courts, should commence with a statement of the writ. By the General Rules of H. T., 2 Will. IV. r. 1, s. 80, "a *scire facias* upon a recognizance taken in Sergeants' Inn, or before a commissioner in the country, and recorded at Westminster, shall be brought in Middlesex only, and the form of the recognizance shall not express where it was taken."

The plaintiff may proceed either by *scire facias* or by action of debt (*p*). The bail are only liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole the amount of their recognizance (*q*).

Form of
scire facias.

The *scire facias* against the bail must issue out of, and be made returnable in, the Court in which the action was depending and in which the record is supposed to remain (*r*); and if the recognizance be recorded at Westminster, it must be brought in Middlesex only (*s*). In form it sets out the recognizance, the judgment, and that the principal has not paid the damages, nor rendered himself, and then commands the sheriff to make known to the bail that they be at Westminster, &c., on, &c., to show, &c. (*t*). The *scire*

(*l*) *Stevenson v. Roche*, 9 B. & C. 707. See further as to the points of practice, 1 Chitty's Arch. Prac. 8th ed. 800.

(*m*) See *ante*, p. 304.

(*n*) 2 Wms. Saund. 6th ed. 72 *a*; Tidd's New Prac. 157.

(*o*) 1 Chitty's Arch. Prac. 8th ed. 801; Tidd, 9th ed. 277.

(*p*) *Ante*, p. 305.

(*q*) 1 R. G. H. T., 2 Will. IV. s.

21; *Vansandau v. Nash*, 2 Dowl. 767.

(*r*) 2 Tidd's Prac. 8th ed. 1150; 2 Wms. Saund. 6th ed. 72 *a*; *Gullam v. Hardisty*, 3 Salk. 320; 2 Chitty's Arch. Prac. 8th ed. 1026.

(*s*) R. H. T., 2 Will. IV. r. 80.

(*t*) See references to the forms, *post*, Append. And further as to the practice, 1 Chitty's Arch. Prac. 8th ed. 800; 2 Tidd's Prac. 8th ed. 1150.

facias must strictly pursue the terms of the recognizance on which it is founded (u). The *scire facias* may issue either separately against each of the bail (x), or jointly against both, the recognizance upon which the *scire facias* issues binding the bail jointly and severally. But if the *scire facias* issues jointly against both, both defendants must be in Court before either are declared against (y), and if one only be summoned and declared against, the proceedings against him will be irregular (y). But although the *scire facias* be joint, yet the execution may issue upon it severally against either of the bail, the record upon which it issues binding jointly and severally (z).

The *scire facias* may be sued out and tested on the return day of the *ca. sa.* (a), or at any time afterwards, if in term time (b); for as the writ of *scire facias* does not come within the 12th section of the Uniformity of Process Act, the writ must be tested in term time (c), and must be made returnable on a day certain in term (d). Four days exclusive are sufficient between the teste and the return of the *scire facias* (e), where one writ only is intended to be issued; but it is usual to allow a longer time where the bail are not summoned, but merely have notice of the *scire facias* (f). The *scire facias* must be left at the sheriff's office four clear searching days before the return day (g). If an *alias scire facias* be issued, it should be tested on the return day of the first *scire facias* (h); and there must be fifteen days between the teste of the first writ and the return of the *alias* (i), without regard to the number of days between the teste and return of each (k). The *scire facias* must not bear teste on a Sunday, as that is not *dies*

When the *scire facias* may be sued out.

When returnable.

(u) 2 Chitty's Arch. Prac. 8th ed. 1025; 2 Wms. Saund. 6th ed. 72 b, n.

(x) *Gee v. Fane*, 1 Lev. 225; *Swainsbury v. Pringle*, 10 B. & C. 754; *Clarke v. Cornish*, 8 Mod. 199.

(y) *Swainsbury v. Pringle*, 10 B. & C. 754; *Tidd's Prac.* 1127; *Impey*, 477; but see *Cocks v. Brewer*, 11 M. & W. 53; *per Parke, B., and Rex v. Young*, 2 Anstr. 448; *Newton v. Maxwell*, 2 Cr. & Jer. 635; 2 Wms. Saund. 72 f, n.

(z) *Gee v. Fane*, 1 Lev. 226.

(a) *Sandland v. Claridge*, 2 Dowl. 115; *Armitage v. Rigbye*, 5 Ad. & El. 81.

(b) *Stewart v. Smith*, 2 Ld. Raym. 1567; 2 Stra. 866; *S. C., Shivers v.*

Brooks, 8 T. R. 628.

(c) *Seaton v. Heap*, 5 Dowl. 247; *Edgell v. Curling*, 8 Scott, N. R. 665; *Bosanquet v. Graham*, 7 Jur. 832.

(d) *Eden v. Wells*, 1 Stra. 694; 2 Ld. Raym. 1417, *S. C.*

(e) *Bell v. Jackson*, 4 T. R. 663.

(f) 1 Chitty's Arch. Prac. 8th ed. 802.

(g) *Armitage v. Rigbye*, 5 Ad. & El. 81; *Williams v. Brown*, 2 Dowl. 749.

(h) *Goodwin v. Peek*, 2 Salk. 599; *Anon.* 6 Mod. 86.

(i) *Anon.* 7 Mod. 40; 2 Salk. 599.

(k) 2 Sellon's Prac. 53; *Elliot v. Smith*, 2 Stra. 1139; *Combe v. Cuttill*, 3 Bing. 162.

juridicus (l). The *alias scire facias* must be left in the sheriff's office four days exclusive of Sundays (m), as well of the day on which it was lodged (n) as of the return day; the days must be the last four days (o).

Amend-
ment of
scire facias.

The *scire facias* against bail may, in the discretion of the Court, be amended by the record of the recognizance (p); but the Court, in the exercise of their discretion, will not think proper to cure any irregularities of which the bail are entitled to take advantage (q).

Signing
judgment
on scire
facias.

By R. G. H., 2 Will. IV. r. 81, "No judgment shall be signed for non-appearance to a *scire facias*, without leave of a Court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave, after eight days after the return of one *scire facias*." In practice, the judges, before they grant leave to sign judgment, have required proof that notice has been sent to the bail, if their residence be known, or if it be not, that proper attempts have been made to ascertain it. But this is entirely discretionary with the judge (r). And the plaintiff must show, by affidavit, that he has attempted to summon the bail or to give them notice, and show what endeavours he has made for that purpose (s). Where the bail are not summoned, they may render their principal at any time within eight days from the return of the *scire facias*, under the R. G. H., 2 Will. IV. r. 81 (t); or even later, if they have not received notice of the *scire facias* (u).

If a writ of error be allowed, though not returned, it is in itself a *supersedeas*, and may be pleaded by the bail to have been issued and allowed after the issuing, and before the return of the *ca. sa*.

(l) 2 Sellon's Prac. 53; *Barret v. Cleydon*, 2 Dyer, 168 a.

(m) *Fraser v. Miller*, 1 Dowl. 141; *Anon. ib.* 142.

(n) *Scott v. Larkins*, 1 Dowl. 202.

(o) *Forty v. Hermer*, 4 T. R. 583; *Williams v. Mason*, 1 East, 89, n.; 2 Wms. Saund. 6th ed. 72 z.

(p) *Perkins v. Petit*, 2 B. & P. 275; *Buzom v. Hoskins*, 6 Mod. 263; *Reg. v. Aires*, 10 Mod. 258, 354.

(q) *Fukwood v. Annis*, 3 B. & P. 321; *Stevenson v. Grant*, 2 New Rep. 108; *Braswell v. Jeco*, 9 East, 316; *Reg. v. Eyre*, 1 Stra. 43; *Holland v. Phillips*, 10 Ad. & E 149.

(r) *Armitage v. Rigbye*, 5 A. & E. 82.

(s) *Higgins v. Wilks*, 1 Dowl. 447; *Wimal v. Cook*, 2 Dowl. 173; *Saunderson v. Brown*, 6 Dowl. 11; *Jerv. N. Rules*, 82, n.; *Lockwood v. Orme*, *ib.*; 1 Chitty's Arch. Prac. 8th ed. 802; *Wilson v. Biden*, 4 M. & P. 537; *Newton v. Maxwell*, 2 C. & J. 635; *Wright v. Page*, 2 W. Bla. 837; *Ex parte Rigbye*, 6 N. & M. 773; S. C., 5 Ad. & E. 76.

(t) *Saunderson v. Brown*, 7 Ad. & E. 261; 6 Dowl. 9, S. C.

(u) *Newton v. Flight*, *Jerv. New Rules*, 83, n.; 1 Chitty's Arch. 803; *Cole v. Buckland*, 2 Stra. 872.

against the principal, so as to avoid the proceedings against them by *scire facias* on their recognizance (x).

Before judgment against the bail on the *scire facias* can be signed, there must be a rule to appear (y). By R. G. H., 2 Will. IV. r. 82, "a notice in writing to the plaintiff, or his attorney, or agent, shall be a sufficient appearance by the defendant on a *scire facias*." Rule to appear.

If a judge's order have been improperly obtained, allowing a judgment to be signed on a *scire facias*, where the bail have not been summoned, or had notice of the proceedings, they should apply to the court to set aside the order, or they will not be allowed to impeach it on a motion by them to set aside the proceedings (z). Setting aside Judge's order for judgment.

By the Law Amendment Act, 3 & 4 Will. IV. c. 42, s. 3, the *scire facias* upon the recognizance must issue within twenty years "after the cause of such action;" that is, after the forfeiture of the recognizance, and "not after." (a) Scire Facias must issue within 20 years.

It seems that after a *scire facias* against bail, error brought on the principal judgment is not a *supersedeas* to the proceedings in the *scire facias* (b).

For references to the forms of the writ of *scire facias* on recognizance of bail, see *post*, Appendix.

(x) *Sampson v. Brown and another*, 2 East, 439. tice, 2 Chitty's Arch. Prac. 8th ed. 1026.

(y) 1 Chitty's Arch. Pr. 8th ed. 803.

(b) 1 Rol. Rep. 371; Poph. 186;

(z) *Ludbrook v. Hewett*, 1 Dowl. 488.

Com. Dig. tit. Bail, (R. 1.); *Ward v. Bendall*, 1 Ld. Raym. 342; *Perkins v. Wilson*, 2 Ld. Raym. 1259.

(a) See *ante*, p. 14, and the prac-

CHAPTER V.

OF SCIRE FACIAS ON RECOGNIZANCE OF BAIL IN ERROR.

The Ancient Rule of Common Law as to Writs of Error, p. 320.

Statutes requiring Recognizance to be entered into to prosecute the Suit and satisfy the Debt, Damages, and Costs of the Judgment on bringing Writ of Error, p. 320.

Depositing Money in Lieu of Bail, p. 323.

Construction of those Statutes, p. 323.

Amount of Bail, p. 323.

Scire Facias on the Recognizance, p. 324.

Proceedings on the Scire Facias, p. 324.

Release, Plea of, p. 325.

Error does not lie on Judgment on Scire Facias, p. 325.

Bail on Error before Parliament, p. 325.

Bail on Error on a Prosecution for a Misdemeanor, p. 325.

The ancient rule at common law as to writs of error.

ANCIENTLY, on a writ of error being brought to reverse a judgment, by one who was party or privy to the record (by whom only such a writ can be obtained) (a), for any error in the foundation, proceeding, judgment, or execution of a suit (b), no bail was required at common law; and it was early felt as an inconvenience, that the defendant, by bringing a writ of error, might delay the plaintiff of his execution, without giving any security for the prosecution of the writ, or for the payment of the debt or damages recovered by the former judgment in case it should be affirmed, or the writ of error should be discontinued, or the plaintiff in error should be nonsuited (c). To guard against this inconvenience, the Courts would not allow the writ, nor a *superseas* upon it, until some error was shown to them in the record (d). More effectually to prevent this evil, the statute 3 Jac. I. c. 8 (made perpetual by 3 Car. I. c. 4, s. 4), was passed, which enacts, that "no execution shall be stayed or delayed upon or by any writ of error or *superseas*, thereupon to be sued for

Statutes requiring recognizance to be entered into to prosecute the suit and

(a) 1 Rol. Abr. 748; Sty. 254, 280; 2 Tidd's Prac. 8th ed. 1189.

(b) Co. Litt. 288. b.

(c) 2 Tidd's Prac. 8th ed. 1203.

(d) 1 Hen. VII. 19; *Eure v. Turton*, 1 Vent. 266; *Handasyde v. Morgan*, 2 Wils. 144; 2 Tidd's Prac. 8th ed. 1203.

the reversing of any judgment in any action or bill of debt upon any single bond for debt, or upon any obligation with condition for the payment of money only, or upon any action or bill of debt for rent, or upon any contract sued in any of the Courts of record at Westminster, or in the counties palatine of Lancaster or Durham [nor by the 19 Geo. III. c. 7, s. 5, for reversing any judgment given in any inferior Court of record, where the damages were under 10*l.* (since extended to 20*l.* by the stat. 7 & 8 Geo. IV. c. 71, s. 6.) (e)], unless the person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties (such as the Court where the judgment was given shall allow of), shall first be bound unto the party for whom the judgment was given by recognizance, to be acknowledged in the same Court in double the sum adjudged to be recovered by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the said judgment should be affirmed, or the writ of error *non-prossed*, all and singular the debts, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution" (f).

satisfy the debt, damages, and costs of the judgment on bringing writ of error.

The operation of this statute was extended to other actions by the 13 Car. II. stat. 2, c. 2, s. 9, by which it is enacted, that "no execution shall be stayed in any of the Courts mentioned in the statute 3 Jac. I. by any writ or writs of error, or *supersedeas* thereupon *after verdict and judgment* in any action of debt grounded upon the statute 2 & 3 Edw. VI. c. 13, for not setting forth tithes, nor in any action upon the case, upon any promise for payment of money, actions *sur trover*, actions of covenant, detinue, and trespass, unless such recognizance (and in such manner as by the former Act is directed), shall be first acknowledged in the Court where the judgment is given."

And by statute 16 & 17 Car. II. c. 8, s. 3 (made perpetual by statute 22 & 23 Car. II. c. 4), it was enacted that no execution shall be stayed in any of the aforesaid Courts (those mentioned in 3 Jac. I.) by writ of error or *supersedeas* thereupon, *after verdict and judgment* in any action personal whatsoever, unless a recognizance, with conditions according to the statute 3 Jac. I., shall be first acknowledged in the Court where such judgment shall be given; and further, that in writs of error to be brought

(e) *Furnish v. Swan*, 10 B. & C. 458;

Crookes v. Longden, 5 Bing. N. C. 410.

(f) See 2 Tidd's Prac. 8th ed. 1105, as

to what actions this statute is confined;

and see notes to *Jacques v. Cesar*, 2

Wms. Saund. 6th ed. 101 m.

upon any judgment after verdict in any writ of dower, or in any action of *ejectione firmæ*, no execution shall be stayed, unless the plaintiff or plaintiffs in such writ of error, shall be bound unto the plaintiff in such writ of dower, or action of *ejectione firmæ*, in such reasonable sum as the Court to which such writ of error shall be directed shall think fit, with condition that, if the judgment shall be affirmed, or the writ of error discontinued in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuit in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sums of money as shall be awarded upon or after such judgment affirmed, discontinuance, or nonsuit. And to the end that the same sum and sums and damages may be ascertained, it is enacted by sect. 4, "that the Court wherein such execution ought to be granted upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire as well of the *mesne* profits as of the damages by any waste committed after the first judgment in dower, or in *ejectione firmæ*; and upon the return thereof judgment shall be given, and execution awarded for such *mesne* profits and damages, and also for costs of suit."

These two last-mentioned statutes are confined to judgments after verdict, and do not extend, like the statute of 3 Jac. I. c. 8, to judgments by default upon demurrer and *nul tiel record*; therefore a writ of error upon these last judgments, was a *supersedeas* without bail in such actions as are not enumerated in 3 Jac. I. (g).

Now, however, by statute 6 Geo. IV. c. 96, s. 1, "for preventing the delays occasioned to creditors by frivolous writs of error, brought on judgments given in his Majesty's courts of record at Westminster, and in the counties palatine," it is enacted, that "upon any judgment hereafter to be given in any of the said Courts, in any personal action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the Court (h), or some judge thereof, unless a recognizance, with conditions according to 3 Jac. 1, c. 8, be first acknowledged in the same Court." Consequently bail in error is now required in all cases after judgment for the plaintiff in any personal action, whether after verdict or by default, &c., unless it be otherwise ordered by the Court or a judge (i). And bail in

(g) See notes to *Jacques v. Cesar*, 2 Wms. Saund. 6th ed. 101 p; 2 Tidd's Prac. 8th ed. 1208; 1 Chitty's Arch. Prac. 8th ed. 493.

(h) *Williams v. Downman*, 7 Q. B. 112.

(i) See notes to *Jacques v. Cesar*, 2 Wms. Saund. 6th ed. 101 p; and

error is now required by this Act, although there be real error in form on the face of the record (*k*).

But it seems that bail may be dispensed with on depositing money in lieu of bail (*l*); and it appears doubtful whether the Court has not power under the 6 Geo. IV. c. 96, in all cases to stay execution without bail in error (*m*). The statutes requiring bail in error have been held to be confined to cases where judgment has been given for the original plaintiff, and not to extend to judgments given for the defendant below: and a party therefore who is plaintiff both below and above, need not give bail in error (*n*). And neither the statutes nor the new rules apply to errors in fact or in process (*o*); therefore bail in error *coram nobis*, or *vobis*, is not necessary; for such a writ of error is not a *super-sedeas* of execution in itself, although the plaintiff cannot take out execution without the leave of the Court (*p*).

Depositing money in lieu of bail.

Construction of these statutes.

If a second writ of error is brought upon the judgment of affirmance, bail must be again put in upon the second writ (*q*); and if the writ be amended, fresh bail must be put in to the amended writ (*r*).

By a general rule of all the Courts, H. T., 2 Will. IV. r. 1, s. 26, "a recognizance of bail in error shall be taken in double the sum recovered, except in a case of a penalty; and in case of a penalty, in double the sum really due, and double the costs."

Amount of bail.

The bail in error bind themselves by their recognizance (according to the statute (3 Jac. I. c. 8), to prosecute the writ of error with effect, and also to satisfy and pay the debt, damages, and costs awarded by the former judgment, and also the costs and damages to be awarded for the delaying of execution, if the said former judgment should be affirmed, or the writ of error be non-

Williams v. Downman, 7 Q. B. 112; Saund. 6th ed. 101 *p*; 1 Chitty's Arch. Prac. 8th ed. 494.

(*k*) *Wordsworth v. Gibson*, 1 Moo. & P. 501; 4 Bing. 572, S. C.

(*o*) *Levy v. Price*, 2 M. & W. 533.

(*p*) *Knight v. Thynne*, 9 Dowl. 984; *Gibbs v. Trevannion*, 8 Dowl. 140.

(*l*) *Collins v. Gwynne*, 2 M. & Sc. 775; *Gwynne v. Collins*, 9 Dowl. 70; see notes to *Jacques v. Cesar*, 2 Wms. Saund. 6th ed. 101 *p*.

(*q*) *Tilly v. Richardson*, 1 Salk. 97; *Colebrook v. Diggs*, 1 Stra. 527.

(*m*) *Williams and others v. Downman*, 2 Dowl. & Lowndes, 134.

(*r*) *Rafael v. Verelat*, 2 W. Bla. 1067; 1 Chitty's Arch. Prac. 8th ed. 494. As to the nature and amount of the recognizance entered into by the bail, their justification, &c. see 2 Tidd's Prac. 8th ed. 1213; 1 Chitty's Arch. Prac. 8th ed. 494, 496; 2 Wms. Saund. 6th ed. 101 *q*.

(*n*) *Duvergier v. Fellowes*, 7 Bing. 463; 5 M. & P. 403, S. C.; *Truman v. Garden*, 1 Dowl. & Ry. 184; 2 Tidd's Prac. 8th ed. 1209; 2 Wms.

Scire facias
on the re-
cognizance.

prossed (s). If the judgment therefore be affirmed, or the writ of error be discontinued, or the plaintiff be non-prossed, the bail are liable on their recognizance (t), for such damages and costs as are given by the Court of error (u), and for interest on that sum from the time of the affirmance (x); and the defendant in error has his option to proceed against them on their recognizance, either by *scire facias* or by action of debt, in the same manner as the plaintiff may proceed against bail to the action (y).

The engagement of the bail being absolute to pay the debt and costs, if judgment should be affirmed, &c., they cannot discharge themselves of their responsibility by rendering their principal (s); and a plea that the principal has rendered himself in execution, is no bar to the action (a), nor are they entitled to relief by his bankruptcy and certificate pending the writ of error (z), nor even if the principal be taken upon a *ca. sa.* for the same debt and damages and costs in error (b). Nor will the bankruptcy and certificate of either or both the bail, before affirmance of the judgment, be any bar to proceedings against them on their recognizance (c). Whilst the names of the bail remain on the bail-piece they are liable (d); but if they do not justify, they may have their names struck out of the bail-piece, upon application to the court (e).

Proceed-
ings on the
scire facias.

In order to proceed by *scire facias* against the bail, the recognizance must be entered and the roll carried in and docketed, as directed *ante*, in proceedings against bail to the action (f). The *scire facias* in this case is tested, and made returnable in the same manner as against bail to the action (g).

If the plaintiff in error have joined in the recognizance, the *scire facias* must be either against him and both the bail, or against

(s) 19 Geo. III. c. 70, s. 5.

(t) *Roe v. Whitehead*, Barnes, 409;
Dickenson v. Heseltine, 2 M. & Sel. 210.

(u) *Collins v. Gwynne*, 2 Scott's N. R. 85.

(x) *Frith v. Leroux*, 2 T. R. 57; 2 Doug. 753, S. C.; *Doe v. Reynolds*, 1 M. & Sel. 247; *Welford v. Davidson*, 4 Burr. 2127.

(y) See *ante*, last chapter.

(z) *Southcote v. Braithwaite*, 1 T. R. 624; Lofft, 238; 2 Tidd's Prac. 8th ed. 1212; 2 Wms. Saund. 72 c.

(a) *Austen v. Monk and another*, Cro. Jac. 402.

(b) *Perkins v. Pettit and another*, 2 B. & P. 440.

(c) *Hockley v. Merry*, 2 Stra. 1043. "Because the debt is but a contingent one, for which the plaintiff cannot come in under the commission."

(d) *Gould v. Holmstrom*, 7 East, 580; *Dickenson v. Heseltine*, 2 M. & Sel. 210.

(e) *Jones v. Tubb*, 1 Wils. 337; Say. 58, S. C.

(f) See *ante*, last chap. p. 316; 1 Chitty's Arch. Prac. 8th ed. 800; 2 Tidd's Prac. 8th ed. 1214.

(g) See *ante*, last chap. p. 316.

each of them severally, otherwise the bail may demur or plead in abatement (A).

The venue must be laid in Middlesex, whether the recognizance were taken in Court or at a judge's chambers, or before a commissioner in the country (i), because the record of the recognizance is filed there, and must be ultimately returned there (k).

The bail may plead, in bar to the *scire facias*, a release made to the principal and bail of all debts, judgments, and executions betwixt the first judgment and before its affirmance (l). But a plea of payment by the principal of a less sum than the judgment, in satisfaction, is no answer, and a bad plea (m).

It seems that error on a judgment in *scire facias*, against bail, will not lie, it not being any of those actions mentioned in the statute whereof a writ of error lies, nor is the bail any party who may have a writ of error of the first judgment (n). Error does not lie on judgment on *scire facias*.

If the judgment be affirmed in error, and error be brought in Parliament on the judgment in error, new bail is required, as the first recognizance does not include payment of costs to be assessed in the House of Lords (o). See references to the forms, *post*, Append. Bail on error on a prosecution for a misdemeanor.

By the 8 & 9 Vict. c. 68, s. 1, execution of a judgment upon a prosecution for a misdemeanor, while a writ of error is depending to reverse such judgment, may be stayed until such writ of error shall be finally determined, on the defendant entering into a recognizance to be acknowledged before one of the judges of her Majesty's Court of Queen's Bench, or one of the Commissioners appointed to take special bail in actions depending in the Superior

(h) *King v. Young*, 2 Anstr. 448; *Reg. v. Chapman*, 3 Anstr. 811; 2 Wms. Saund. 72 c; or move to set aside the declaration for irregularity, *Knowles v. Johnson*, 2 Dowl. 653.

(i) See Reg. Gen. H. T. 2 Will. IV. r. 1, § 80, *ante*, 316; and 1 Chitty's Arch. Prac. 8th ed. 801; 2 Wms. Saund. 72 d.

(k) See *Hartley v. Hodgson*, 2 J. B. Moore's Rep. 70, *per* Park, J.; *S. C.*, 8 Taunt. 171.

(l) *Harrison v. Hucksley and others*, Cro. Jac. 401; *S. C.*, 1 Roll. Abr. 335; Moore, 852; 2 Bulst. 230; Co. Litt. 290. b.

(m) *Holmes v. Browne*, 2 Lev. 212;

and see other pleas, *Askew v. Downes*, Roll. R. 361; *Barrett v. Miward and another*, Vent. 75.

(n) *Vaughan v. Williams*, Cro. Jac. 171; *Atwood v. Burr*, 5 Mod. 397; 27 Eliz. c. 8, s. 2; 2 Wms. Saund. 71 a, n.; *Nevill v. South and another*, Cro. Car. 286; *Lancaster v. Keyleigh and others*, Cro. Car. 300; *Anon.* Cro. Car. 464; *Harvey v. Williams*, 1 Roll. Rep.; *Wingate v. Stanton*, 1 Vent. 38; *Hartop v. Holt*, 1 Salk. 263; 1 Will. IV. c. 70, s. 8; *Williams v. Moor*, 2 Keb. 175; but see *King v. Simmonds*, 1 Ho. of Lords Cases, 754, 770, and *Cross v. Law*, 6 M. & W. 217, 223.

(o) *Tilly v. Richardson*, 1 Salk. 97.

Courts, with two sufficient sureties, to be approved of by such Judge or Commissioner, in such sum as either shall direct, to prosecute such writ with effect; and in case the judgment shall be affirmed, forthwith to render the said defendant to prison, according to the said judgment, where imprisonment shall have been adjudged; and every such recognizance shall, after justification of bail, be filed of record in the said Court of Queen's Bench, in like manner and upon payment of the like fees as in the case of other recognizances filed in the Crown Office in that Court; the Judge of the said Court and the Commissioner to have the like powers in respect of justifying such bail in error and the examination of the sureties; *and the like rules shall apply as in respect of special bail in actions depending in such Court (p).* Provided always, that if any defendant be under legal disability, it shall be sufficient if two persons, to be approved of by such judge or commissioner, shall become bound by recognizance on behalf of such defendant, to be acknowledged and conditioned as aforesaid.

(p) See *ante*, bk. iii. ch. iv. p. 303; on recognizances in the Crown Office, and see the practice as to *scire facias ante*, p. 298.

CHAPTER VI.

SCIRE FACIAS AGAINST PLEDGES IN REPLEVIN AND AGAINST THE SHERIFF.

<i>The Statute of Westminster II.</i>	<i>from the Pledges of the Sheriff,</i>
<i>requiring the Sheriff to take</i>	<i>p. 327.</i>
<i>Pledges in Replevin, p. 327.</i>	<i>The Modern Practice, p. 328.</i>
<i>The former Mode of recovering</i>	<i>Forms, p. 329.</i>

ALTHOUGH the practice of suing out a writ of *scire facias* against the pledges in replevin, to compel a restoration of the cattle replevied, or against the sheriff for their value if he took insufficient pledges, is now obsolete, yet a treatise on the writ of *scire facias* would be, in some measure, imperfect if it did not briefly refer to what is still law, though not the modern practice.

The Statute of Westminster the Second (a) requires the sheriff, before he executes the writ of replevin, to take from the plaintiff not only pledges to prosecute, but also to return the cattle, &c., if a return should be adjudged; and ordains that if a sheriff shall take pledges in any other manner he shall be answerable for the price of the cattle, and the person who distrains shall recover by writ, that the sheriff shall render to him as many cattle or goods.

Statute of Westminster 2, requiring the sheriff to take pledges in replevin.

The practice was, under the 17 Car. II. c. 7, s. 3 (which gives the value of the distress to the avowant if judgment should be given for him), and under the 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3 (which, if judgment were given for the avowant, or the plaintiff were *nonsuit*, gave damages and costs to the avowant (b)), for the avowant or defendant in the replevin suit, if judgment were given for him, to sue out a writ of *retorno habendo*, and an inquiry of damages (c), and upon the return thereof final judgment was entered up for the defendant to recover as well the damages and costs assessed by the jury, as the costs adjudged by the Court, which the defendant might enforce by the ordinary writs of *ca. sa.* or *fi. fa.* This was the regular form

The former mode of recovering from the pledges or the sheriff.

(a) 13 Edw. I. c. 2.

(c) Thes. Brev. 220; Lill. Ent. 600,

(b) 1 Wms. Saund. 6th ed. 195, n. 3. 601, 602, 604.

of the judgment; but it sometimes happened that the plaintiff, after the cattle, &c., were delivered to him by virtue of the replevin, secreted or otherwise disposed of them, so that the sheriff could not restore them to the defendant according to the exigence of the writ. In that case the sheriff returned an *averia elongata* that the cattle, &c., were *eloigned*, as it is called, that is, were conveyed to places unknown to him, so that it was not in his power to obey the writ. Upon this return it was usual to award another writ to the sheriff, directing him to take other cattle of the plaintiff, &c., of equal value with those *eloigned*, and deliver them to the defendant, to be by him detained irreplevisable until such time as the cattle first taken should be forthcoming; this was called a *capias in withernam* (d). If the plaintiff had no cattle, &c., which could be so taken the sheriff returned *nihil* to that writ, and the defendant thereupon sued out a *scire facias* on the judgment of *retorno habendo* against the pledges who had undertaken to the sheriff in pursuance of the Statute of Westminster the Second, that the cattle, &c., should be returned to the defendant, to show cause why their cattle, &c., to the value of the cattle, &c., *eloigned*, should not be delivered to the defendant (e); and if no cause were shown a writ issued to take their cattle, &c. But if they had none the sheriff returned *nihil* also to that writ, and then a *scire facias* was awarded against the sheriff himself, that he render to the defendant as many cattle, for not having returned sufficient pledges (f). And the defendant was also entitled to recover his damages and costs under the statutes of Hen. VIII. (g).

The modern practice.

Now, however, a much less circuitous practice is adopted, and where the defendant elects to proceed at common law, and not under the stat. 17 Car. II. c. 7 (h), upon the return of an *elongata* to the writ of *retorno habendo*, it is no longer necessary to sue out a *capias in withernam* against the plaintiff, or a *scire facias* against the pledges or sheriff; but the defendant, in case the sheriff has

(d) Thes. Brev. 62, 63, 64; Lill. Ent. 553.

(e) See the form of the *scire facias* in Rast. Ent. 569 b; Thes. Brev. 274, 275; and see *Dorrington v. Edwin*, 3 Mod. 56; S. C., Comb. 1; Skin. 244; 2 Show. 421, 485; *Morgan v. Gray*, Cro. Car. 446.

(f) *Trevors v. Michelborne*, Hutt. 77; 2 Inst. 340; Year Book, 2 Hen.

VI. fol. 15; and 9 Hen. VI. fol. 42; Gilb. Replevin, 126.

(g) Rast. 562 b; Co. Ent. 589 a, 572 b, 573 a, 591, 595 a; Thes. Brev. 62, 63; Lib. Plac. 452, pl. 23; 2 Inst. 340; *Combes v. Cole*, Ca. t. Hardw. 352.

(h) 1 Wms. Saund. 6th ed. 195 b, n. (d).

taken no pledges at all, or such as are insufficient, may bring an action on the case against him to recover the amount of the debt and costs (i); and as against the pledges, the practice now is to bring an action against them upon the replevin bond, of which the defendant may take an assignment under the stat. 11 Geo. II. c. 19, s. 23, without issuing any *scire facias* (k)

If required, references to the forms will be found in the Appendix, *post*.

(i) *Ross v. Patterson*, 16 Vin. 399, 400; *Gibson v. Burrell*, 4 T. R. cited, 434; *Evans v. Blander*, 2 H. Bla. 547; *Anon.* Sir W. Jones, 378; *Paul v. Goodluck*, 2 Bing. N. C. 224; 2 Inst. 340; *Bradyll v. Ball*, 1 Bro. Ch. Ca. 427; *Hucker v. Gordon*, 1 Cr. & M. 58; 1 Wms. Saund. 6th ed. 195 b, n.;

Richards v. Acton, 2 W. Bla. 1220; *Tesseyman v. Gildart*, 1 N. R. 292; *Page v. Eamer*, 1 B. & P. 378; *Turner v. Turner*, 2 B. & B. 107; *S. C.*, 4 Moore, 606, 616; *Baker v. Garratt*, 3 Bing. 56; 2 Sellon's Prac. 226.

(k) 2 Chitty's Arch. Prac. 8th ed. 1022; 2 Tidd's Prac. 8th ed. 1079.

CHAPTER VII.

SCIRE FACIAS ON BOND TO THE CROWN.

- Nature of Bond to the Crown*, p. 330.
- Made by Stat. 33 Hen. VIII. c. 39, of the same Force and Effect as Statutes Staple*, p. 330.
- May be put in Execution by Extent when the Debt is in danger*, p. 331.
- The ordinary and proper Course of Proceeding when the Debt is not in Danger, is by Scire Facias*, p. 331.
- Ancient Practice before the Stat. of Hen. VIII.*, p. 331.
- Reasons for the passing of the Stat. 33 Hen. VIII. c. 39*, p. 331.
- Enactments of the Stat. 33 Hen. VIII. c. 39*, p. 333.
- From what Time Bonds to the Crown bind the lands of the Crown Debtor*, p. 334.
- Issuing of the Writ of Scire Facias*, p. 335.
- Its Form*, p. 335.
- Its Teste and Return*, p. 335.
- Service and Return to the Writ*, p. 336.
- Appearance to the Writ*, p. 336.
- Entering up Judgment on Default of Appearance*, p. 336.
- Motion to set aside Writ for Irregularity*, p. 336.
- Further Time to plead*, p. 337.
- Declaration*, p. 337.
- Pleas*, p. 337.
- Replication*, p. 338.
- Demurrer*, p. 338.
- Notice of Trial*, p. 339.
- Judgment*, p. 339.
- Arrest of Judgment*, p. 339.
- Costs*, p. 339.

Nature of
bond to the
Crown.

A BOND to the Crown is an obligation entered into by a person, or by his sureties, or by both, for the payment of excise or revenue duties (a), for exporting bonded goods (b), for faithfully performing the duties of an office under the Crown, and paying over moneys received (c), or for the due discharge of the duties and passing the accounts of a committee of a lunatic (d), &c.

By stat. 33
Hen. VIII.
c. 39, made
of the same
force and
effect as
statutes
staple.

By statute 33 Hen. VIII. c. 39, s. 50, these bonds are made of "the same kind, quality, force, and effect, to all intents and purposes as recognizances acknowledged according to the Statute of the Staple at Westminster" (e), and they may therefore be put in

(a) *Rex v. Ellis*, 1 Price, 23; *Rex v. Barry*, 6 Price, 174; *Reg. v. Chapman*, 3 Anstr. 811.

(b) *Rex v. Dixon*, 11 Price, 204.

(c) *Rex v. Chalk*, 12 Price, 661.

(d) *Reg. v. Chambers*, 11 M. & W. 776; *Re Bull*, 2 Coop. Ch. Ca. 63.

(e) See *ante*, book i. ch. vii. pp. 10, 78, 96; *Gilb. Exch.* 166.

execution at any time without the delay or charge of an action, or of a *scire facias* (*f*) upon an affidavit before a baron of the Exchequer (*g*), of the obligor's insolvency, and that the debt is in danger of being lost; and obtaining the *fiat* of the Chancellor, or of one of the barons of the Exchequer (*h*). This proceeding is called issuing an *extent in chief*, from its being issued in the first instance without the intervention of a *scire facias* (*h*). But if the debt itself be doubtful, or the debtor be solvent (*i*), or the bond is to be put in force against sureties (*k*), or is conditioned for the performance of covenants and other collateral things (*l*); the ordinary and proper mode is to proceed by *scire facias* on the bond (*k*), and thus to give the defendant an opportunity of pleading any answer he may have to the debt claimed.

May be put in execution by extent, when the debt is in danger.

The ordinary and proper course of proceeding when the debt is not in danger is by *scire facias*.

But we have already seen that a *scire facias* must be founded on a record (*m*), which a bond not acknowledged before justices is not. Before the passing of the statute 33 Hen. VIII. c. 39, therefore when a bond was acknowledged to the King, not before justices, the practice was to take a warrant of attorney to confess judgment upon such bond in an action of debt, and when such judgment was entered, it became matter of record upon which (if the debt were in danger) a *levari facias*, to extend the obligor's lands and chattels, could at once issue, or a *scire facias*, if the debt were doubtful; upon obtaining judgment on which, the *levari facias* ultimately issued (*n*).

Ancient practice before the stat of Hen. VIII.

Chief Baron Gilbert, in his Treatise on the Court of Ex-Reasons for the passing

(*f*) See *ante*, book i. ch. vii. p. 71, 80; *post*, p. 332; and Gilb. Exch. 126.

(*g*) Gilb. Exch. 166, 102; see *ante*, book i. ch. vii. p. 96.

(*h*) 2 Tidd's Prac. 8th ed. 1092; West on Extents, 18; *Rex v. Moseley*, West, 48 n.

(*i*) *The King v. Pearson and another*, 3 Price, 288, 292.

(*k*) *Rex v. Yale*, Bunb. 58; Gilb. Exch. 106, 166; 2 Tidd's Prac. 1092.

(*l*) *Rex v. The Bishop of Exeter*, per Lord Hale. Upon a bond or recognizance to the King, conditioned for the performance of covenants and other collateral things, a *scire facias* shall first issue, and not an immediate extent; Mich. 18 Car. II.; West, 327.

(*m*) Book i. ch. i. p. 2; West on Extents, 18, 20.

(*n*) Gilb. Exch. 122. The practice in Ireland was the same. "If a bond with a warrant of attorney be entered into, the warrant is brought to the officer, who enters a consent in his book of judgments, that judgment be forthwith entered up for his Majesty, and that execution may issue; in this case there is a *scire facias* made out, signed by the officer and filed, but never sealed, which is first enrolled, and is in the nature of a declaration at common law; and the judgment made up as those in the Plea side by *cognovit actionem*, because they could not stay the return of the *scire facias* to delay the King's execution, nor clog the rolls with two

of the stat.
of 33 Hen.
VIII. c. 39.

chequer (o), in speaking of the statute 33 Hen. VIII. c. 39, and the reasons for its passing, says :—"Towards the time of Hen. VII. and Hen. VIII., as the revenue increased, merchants were obliged to make payments, the customers and collectors received bonds from the parties to the King; these collectors were no more than bailiffs or receivers, and not as justices between the King and the party, and therefore the acknowledgments made before them were not in a court of record; and there was before the 33 Hen. VIII. c. 39, a difference between them and bonds [of record]; that these [recognizances] were immediately levied by the *levari*; but those debts, not of record, could not be levied by a *levari*, but a *scire facias* was to issue thereupon; and the reason of the difference is, that where an obligation is acknowledged in a Court of record, such recognizance is the same as a judgment; the conusor is personally present, and the Court is supposed to know him as such a defendant against whom they give judgment; and hence it is that the *levari* issues and all the other prerogative process; and that the debt cannot be discharged until there be a receipt upon record. But where the King's ministerial officer takes an obligation to the King, such obligation is not of record; and when the officer *delivers such obligation into Court, the time of delivery is recorded*; so that, if that obligation *be just, and the conusor has nothing to say against it*, nobody can controvert the time of his lien, because the *delivery is of record*; and therefore it ought to bind from that time. But the obligation is no more than a warrant of attorney for the ministerial or other person to deliver it of record: for being an act *in pais*, and not of record, the conusor may come in upon the return of the *scire facias*, and traverse the obligation. But in this it differs from a warrant of attorney, for if a man forge a bond and warrant of attorney, and then confess judgment, the defendant can never deny the deed, if a *scire facias* issued after a year and a day. And in this case there is no judgment upon the bond, for the bond is only delivered of record, and therefore the judgment upon the bond arises only on the *scire facias* (p).

writs and two returns from the sheriff. But when judgment is given in debt, there may be a *levari* immediately, because it is an immediate execution of the King's judgment; and the taking out *scire facias* proceeds from ignorance of the clerks in taking out such

scire facias, as if only a bond had been sued, and there had been no warrant of attorney to enter judgment."

(o) An Historical View of the Court of Exchequer, ed. 1738, 120.

(p) *Attorney-General v. Sewell*, 4 M. & W. 90.

"But with us those things are set upon another foot; for the bonds *in pais* are by 33 Hen. VIII. c. 39, made statutes staple, and therefore the lien is from the time of the acknowledgment, and the *levari* may at any time issue within a year after the day that the money in the obligation is payable, and if they exceed the year, then there must be a *scire facias*, as in the case of common statutes staple (*q*), and the reason why they were in the statute made in the nature of statutes staple, is because they were pocket securities when taken by the officer, who is not a person authorized to make them of record: but that the King's revenue might not suffer by the negligence of the officer in carrying them up to enter of record, they were liens upon the estate from the time they were taken by such officer; and they thought it reasonable to make pocket securities to be liens upon a man's estate, as well in behalf of the King's revenue, as in behalf of a merchant" (*r*).

Such being the reasons for the passing of the statute of 33 Hen. VIII. c. 39, the statute, by its 50th sect., enacts, that "all obligations and specialties which shall be made for any cause or causes, touching or in any wise concerning the King's most royal Majesty, or his heirs, or to his or their use, commodity, or behoof, shall be made to his Highness and to his heirs, Kings, in his or their names, by these words, 'to the Lord the King,' and to none other person or persons to his use, and to be paid to his Highness by these words, 'to be paid to the said Lord the King, his heirs or executors,' with other words used and accustomed in common obligations; and that all such obligations and specialties, so to be made, shall be good and effectual in the law to all intents and purposes, and shall be of the same nature, kind, quality, force, and effect, to all intents and purposes, as the writing obligatory taken and acknowledged according to the Statute of the Staple at Westminster, had at any time before the making of that Act been taken, used, exercised and executed, against any lay person or persons." And sect. 51 enacts, "that all such obligations and specialties, the debt whereof not being paid, nor contented in the life of the King, shall come, remain, and be to the heirs or executors of the

Enactments of the stat. 33 Hen. VIII. c. 39.

(*q*) *Sed quære* as to this; see *ante*, book i. ch. vii. p. 78, of stat. staples. And in the case of the king there need not be any *scire facias* to revive the judgment after a year and a day; 2

Salk. 603; Gilb. Exch. 166, 7; 1 Price, 395; West, 316; 2 Tidd's Prac. 8th ed. 1090; Bac. Abr. tit. Prerogative, E. 6.

(*r*) Gilb. Exch. 126.

King, at the free liberty, disposition, assignment, and appointment of the same King, to whom such obligations or specialties shall be made as aforesaid." And sect. 53 enacts, "that all such process, judgments, decrees, and executions thereafter to be taken, pursued, or given for the King, in any of the King's Courts mentioned in that Act, of or upon any of the same obligations, shall be of the same or like strength, force, effect, and intent in the law, to all purposes, only against all and all manner such person or persons as are bound in such obligations or specialties, as well spiritual as temporal, and against their heirs, successors, executors, and administrators, and every of them, and against none other, as writings obligatory taken and acknowledged according to the Statute of the Staple at Westminster, at any time before the making of that Act, had been used to be taken, exercised, and executed against any lay person or persons."

Under the operation of this statute, even if a *scire facias* have issued on a bond, an immediate extent may afterwards issue on an affidavit of danger; and the Queen may proceed thereon either by *scire facias*, or by extent, or by both (*s*). But if it be doubtful whether the bond be forfeited, or if the suit be against sureties, then the more usual and proper mode is to proceed by *scire facias* (*t*); and when the debtor is solvent, the Queen has no election, but must proceed against him by *scire facias* (*u*).

From what time bonds to the Crown bind the lands of the Crown debtor.

Bonds to the Crown, by sect. 50 of the statute 33 Hen. VIII. c. 39, bind the lands from the time they are entered into (*x*). And if the Queen's debt be prior on record, it binds the lands of the debtor into whose hands soever they come (*y*). Chattels are

(*s*) *Rex v. Blundell*, Bunb. 74.

(*t*) *Rex v. Yale*, Bunb. 58; Gilb. Ex. 166; and see West on Extents. 13. The reason is because the goods of the principal debtor may be sufficient for the payment of the debt, and the surety is only liable if the principal debtor fail in payment of the debt. "We or our bailiffs shall not seize any lands or rent for any debt as long as the chattels of the debtor *forthcoming* suffice to pay the debt, and the debtor himself be ready to satisfy thereof. Neither shall the sureties of the debtor be distrained as long as the principal debtor be sufficient for the payment of the debt. And

if the principal debtor fail in payment of the debt, not having wherewith to pay, or will not pay when he is able, the sureties shall answer for the debt; and if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him."—*Magna Charta*, 9 Hen. III. c. 8.

(*u*) *The King v. Pearson and another*, 3 Price, 288, 292.

(*x*) Gilb. Exch. 88; Bac. Abr. tit. Execution, K; *Rex v. Mann*, 2 Stra. 754; 2 Wms. Saund. 70*f*.

(*y*) Bac. Abr. Execution, K; 2 Wms. Saund. 70*f*.

bound only from the *teste* of the writ of extent, grounded on a bond debt (z).

Bonds given to the King in matters of lunacy are likewise prosecuted by *scire facias*; but these bonds being prepared, and in the keeping of the clerk of the Custodies, the first writ is issued by him; this writ being returned and filed in the Petty Bag, the subsequent proceedings are the same as in the case of recognizances (a).

On a bond, therefore, to the Crown, which by force of the statute 33 Hen. VIII. c. 39, becomes a record, unless the circumstances warrant an affidavit of danger, on which an immediate extent issues, the proceeding to recover the debt is by *scire facias*.

The *scire facias* issues under the seal of the Court of Exchequer, and is signed by the Queen's Remembrancer, and tested by the Lord Chief Baron (b). It recites the bond as the foundation of the proceeding, and commands the sheriff, to whom it is directed, to warn the defendant to appear before the Barons of the Exchequer on a day certain, in term or vacation (c), to show cause why the debt should not be levied against him (d). The *scire facias* must be awarded into the proper county in which the debtor is mentioned in the bond to reside, except it be returned in London, Middlesex (e).

The *scire facias* may be issued out in vacation, and may now, by the 5 & 6 Vict. c. 86, s. 8 (f), be tested and made returnable

Issuing of the writ of scire facias.

Its form.

Its teste and return.

(z) Man. L. Ex. 542; 2 Tidd's Pr. 8th ed. 1099, 1101.

(a) See *ante*, p. 281, n. (z); 3 Danl. Ch. Prac. 456, n. Bonds executed by the committee of the estate of a lunatic, to the Queen, are kept by the Masters in Lunacy; 2 Coop. Chan. Ca. 63, n. (b).

(b) Man. Exch. Prac. 136; see 5 & 6 Vict. c. 86, s. 8.

(c) 5 & 6 Vict. c. 86, s. 8.

(d) See *post*, Append. references to Forms; Tremaine, Pleas of the Crown, 608; Tidd's Forms, 492; West, 316.

(e) Rules and Orders of the Court of Exch. Hil. T. 15 Car. I. r. 7.

(f) The following is the 8th sect. of the 5 & 6 Vict. c. 86:—"And whereas there is often inconvenient delay and great expense incurred in

recovering debts to the Crown, more particularly with respect to extents, by reason of the intervals between the terms, be it enacted, that all, or any commissions, extents, writs, or other process of whatever denomination, to be hereafter issued from the office of her Majesty's Remembrancer, in pursuance of this or any former or other Act or Acts, or according to the ancient usage or practice of the Court of Exchequer, may bear teste, and be made returnable and be returned on any day certain in Term or Vacation, to be named in such commission, extent, writ, or other process, and thereupon and at the return of any such commission, extent, writ, or other process, the like rules may be given, and such other proceedings had, and such subsequent writ and process

on any day certain, to be named in the writ, in term or vacation (*g*). This process issues of course without the fiat of a Baron (*h*).

The *scire facias* need not state a breach of the condition of the bond (*i*).

Service and
return to
the writ.

The writ having been delivered to the sheriff, he makes out his warrant or summons to his officer, who delivers a copy to the defendant, or leaves it at his usual place of abode, and returns the writ indorsed *scire feci* (*k*). If, however the sheriff cannot find the defendant within the county before the return day, and has no notice that he has any place of residence there, he returns *nihil habet in ballivum meum per quod scire facere potui* (*l*); in which last case a second, or *alias scire facias* issues (*m*). On the return of *scire feci*, or of two *nihil*s, a four-day rule is given on the writ for the defendant to appear and plead thereto (*n*). If the defendant appear, then another four-day rule is given for the defendant to plead (*o*). If, however, the defendant do not appear on the first rule, or if he appear and do not plead to the second rule, process of extent may issue, without any judgment, on the *scire facias*; or judgment may be entered up for the Queen on the defendant's default, in not appearing, or in not pleading after appearance (*p*).

Appearance
to the writ.

Entering up
judgment
on default
of appear-
ance.
Motion to
set aside

It is an indulgence in the Court not to enter up judgment, for if judgment be entered up, the Court is concluded, though the defendant should have had no notice of the debt (*q*).

If a *scire facias* issue irregularly, a motion may be made to set

issued at any time in vacation as may be given, had or issued in Term, or at or before the seal day after Term; and all such commissions, extents, writs, or other process, rules and proceedings, shall be as valid and effectual as if the same had been tested and made returnable, or given or had or issued, in term, according to the common law and course of the Exchequer. Provided always that nothing herein contained shall extend to alter the time for filing any pleadings, or to authorize the entering up of any judgment in vacation; and that where any person shall enter a claim to any goods seized under any extent, or returned as forfeited (which it shall be lawful to do in vacation), the further proceedings shall be

only according to the ordinary practice and course of the Court."

(*g*) *Reg. v. Pearson*, cited in West, 316, n.; Man. Exch. Prac. 138.

(*h*) *The King v. Thompson*, 3 Price, 279; Man. Exch. Prac. 136.

(*i*) Man. Prac. of the Exch. 137.

(*k*) Tremain, 609; Tidd's Pr. 492; West, 317; Man. Exch. 138.

(*l*) Gilb. 169; *Id.*

(*m*) West, 317; Tremain, 609; Tidd's Prac. 492.

(*n*) See *post*, Append.; Gilb. 169; Man. Exch. 139.

(*o*) See *post*, Append.

(*p*) West on Extents, 318; *Rex v. Donithorne*, Parker, 94; Gilb. Exch. 169; Man. Exch. 139.

(*q*) Gilb. Exch. 170.

it aside for the irregularity (*r*). But it seems that in this, as in ^{writ for irregularity.} other cases, the irregularity is cured by appearance (*s*).

If one of two defendants make default, and it is returned that the other has nothing (*t*), or is dead (*u*), execution issues against the defaulter (*x*).

If the obligor die, a *scire facias* issues against the heir or the executors, upon a bare suggestion, without any return of the death by the sheriff (*y*).

When the *scire facias* is returnable on the last day of term, a rule may be given for the defendant to appear by the sealing day after such term; and in default thereof, proceedings may be had as where there are days in term for giving such rules (*z*).

The defendant may obtain six weeks' further time to plead after ^{Further time to plead.} the expiration of the four days, on a motion of course on the signature of counsel; and may, on an affidavit of special circumstances, obtain further time, after the expiration of the six weeks, by motion in Court (*a*): and since the 5 & 6 Vict. c. 86, s. 8 (*b*), it would seem that further time to plead may be obtained in vacation, by application to a judge at chambers, as in other cases.

The defendant having appeared, the Crown may declare (*c*); ^{Declaration.} but in practice no declaration is filed or delivered, and the plea or judgment follows the writ and return. The defendant may ^{Pleas.} plead in abatement, or he may plead in bar, or demur, in the same manner as the traverser of an inquisition on an extent;

(*r*) *Res v. Pearson*, 3 Price, 288; Man. Exch. Fr. 138; 3 D. & L. 714; S. C.

(*s*) See *Dean v. Regiam*, in error, 15 M. & W. 485; in which case the objection was raised that the *scire facias* had issued before the commission on which it was founded was returnable, and therefore before there was any debt of record. To which it was answered that it was only ground of motion to set aside the writ for irregularity, and that the irregularity had been cured by appearance. The Court of Exchequer Chamber held, that the objection amounted only to an irregularity, and not to error on the record: that the *scire facias* in this case was in the nature of process to bring the party

into Court to answer; and if the teste of mesne process was too early, that did not make the process a nullity, but irregular only.

(*t*) 1 Roll. Abr. 890, pl. 1.

(*u*) *Ibid.* pl. 2.

(*x*) Man. Exch. 139.

(*y*) Sav. 3, pl. 7; Man. Exch. Prac. 137.

(*z*) West, 318; Rules and Orders of the Remembrancer's office in the Court of Exchequer; Man. Exch. 139.

(*a*) West. 318; Man. Exch. 139.

(*b*) See *ante*, 334 n. (*f*).

(*c*) The declaration is merely a transcript of the writ and appearance; Tidd's Prac. 8th ed. 1092, 1141, 1142, n. (*f*).

the only difference being, that as the *garnishee* in *scire facias* is always in possession, he is to be considered in all cases as a defendant (*d*).

The *scire facias* must follow the bond on which it is founded. Thus a *scire facias* against A. and B., requiring "that they severally be and appear to show cause," &c., on a bond to the Crown, executed by A., B., and C., is bad (*e*).

The defendant cannot have leave to plead several matters, without the consent of the Attorney-General (*f*).

If the bond be denied, the *plea* is not *nul tiel record*, but *non est factum*; and in pleading, the bond, though put on the footing of a statute staple by the statute, is not treated as a record, but as a bond (*g*). So if performance of the condition of the bond be pleaded, the plea to the *scire facias* is just the same as to a declaration on a bond at the suit of a subject (*h*).

A set-off cannot be pleaded to the bond (*i*), the Crown not being named in the Statutes of Set-off; nor, for the same reason, can payment after the day mentioned in the condition be pleaded, nor the bankruptcy of the defendant, nor, in short, any defence given by statutes in which the Crown is not named (*k*).

Replication. When a demurrer is filed, the defendant must join in demurrer in six days, or else judgment by *nihil dicit* may be entered (*l*).

The defendant, or party pleading, cannot rule the Crown to reply; but where the Attorney-General will not reply or demur in a reasonable time, the Court will order judgment to be entered for the defendant, unless the Attorney-General, on being attended, will either enter a *nolle prosequi* or proceed (*m*).

The subsequent pleadings upon writs of *scire facias* are subject to the same rules as those which govern pleadings on extents, the record upon which the *scire facias* issues giving to the Crown the same privileges in respect of a double replication (*n*).

Demurrer. After having demurred, the Queen may waive her demurrer, and

(*d*) Man. Exch. Prac. 139.

(*e*) *Reg. v. Chapman*, 3 Anst. 811; *Reg. v. Young*, 2 Anst. 443; *Eccleston v. Cliphams*, 1 Wma. Saund. 154; Man. Exch. 141.

(*f*) *Rex v. Caldwell*, Forr. 57; *Rex v. Sir C. Peck and others*, Hardr. 189.

(*g*) *Rex v. Broadnax*, Tremaine's Pl. of the Crown, 608; *Rex v. Thorpe and others*, *ib.* 508; West on Extents, 199.

(*h*) West, 199.

(*i*) *Rex v. Coupland*, Hughes, 204; *Rex v. Ellis*, 1 Price's Rep. 23.

(*k*) West, 199.

(*l*) Orders and Rules of Proceedings in the Office of the Remembrancer of the Court of Exchequer, West, Append. 127.

(*m*) *Rex v. Musters*, Parker, 50; West on Extents, 213.

(*n*) Man. Exch. 141, 199.

take issue (o), and after issue joined, she may waive the issue and demur (p) in the same term (q).

When a replication is filed, the defendant must rejoin within four days, or else judgment by *nihil dicit* may be entered (r). The replication, whether it conclude to the country, or with a verification, should be signed by the Attorney-General, all the proceedings being in his name (s).

Notice of all trials in London or Middlesex must be given six days before such trials; and of all trials at the assizes within six days after the end of the term (r). Notice of trial.

Upon the return of the *postea*, judgment may be entered within four days, upon a rule given, if nothing be said to the contrary. On trials in London or Middlesex, and within the term judgment may be entered of the same term. On trials at bar judgment may be entered within four days after such trial, if there be so many days in term; and if there be less than four days in term, then judgment may be entered the last day of term (r). Judgment.

A motion cannot be made in arrest of judgment on a *scire facias*, after the first four days of term (t). Arrest of judgment.

On a joint *scire facias* against several, the execution must be joint against all, or several against each (u).

Upon a *scire facias* being determined, upon verdict or demurrer, in favour of the Crown, an extent may issue with or without the entry of an award of execution (x).

The general rule as to costs in cases where the Crown is concerned, is that it is the Queen's prerogative not to pay them to a subject, and it is beneath her dignity to receive them (y). Different statutes, however, have created some exceptions to this rule; and by the 33 Hen. VIII. c. 39, s. 54, it is enacted, "That the King, in all suits hereafter to be taken in or upon any obliga- Costs.

(o) Bro. Waiver des Choses, pl. 24; Man. Exch. 108.

(p) Staundf. Prerogative, 65; Plowden, 322, per Onslow; Attorney-General v. Mellor, Hardr. 452.

(q) *The King v. The Bishop of Worcester*, Vaug. 65; Man. Exch. 108.

(r) *Ibid.* ut supra; and see ante, p. 334, n. (f); sect. 8 of 5 & 6 Vict. c. 86.

(s) *Rex v. Rippon*, West, 214.

(t) *Rex v. McLeod*, 3 Price, 203; Man. Exch. 141; and see now R. G., H. T. 2 Will. IV. s. 65; *Brook v.*

Finch and another, 6 Dowl. 313; *Weston v. Foster*, 5 Dowl. 54; *Thomas v. Jones*, 4 M. & W. 31; *Moon v. Robinson*, 14 M. & W. 427.

(u) *King v. Young*, 2 Aust. 448; *Gee et Uxor v. Fane*, 1 Lev. 225.

(x) Man. Exch. 141.

(y) 3 Bla. Com. 400; 1 Anstr. 50; 7 T. R. 367; and see *Attorney-General v. The Corporation of London*, 18 L. J., N. S., Chan. 340; 19 L. J., N. S., Chan. 314.

tion or specialties, made or hereafter to be made to the King, or any to his use, shall have and recover his just debts, *costs* and damages, as other common persons use to do in suits and pursuits for their debts (*s*).

A Crown solicitor's bill of costs may be taxed (*a*).

(*s*) See West on Extents, 227 ; Man.
Exch. 69.

(*a*) *Rex v. Collingridge*, West, 230 ;
Tidd's Prac. 8th ed. 330, 1131.

CHAPTER VIII.

OF SCIRE FACIAS ON INQUESTS OF OFFICE TO RECOVER SIMPLE-
CONTRACT DEBTS FOUND DUE TO THE CROWN.

Mode of recovering Simple-Contract Debts due to the Queen,
p. 341.

Inquest of Office, what it is, p. 342.

Origin of Inquests of Office, p. 342.

Their Object, p. 342.

Issuing of the Commission to inquire as to Crown Debts, p. 342.

The Inquisition, when returned, becomes a Record, p. 343.

Inquisition should be certain, p. 343.

What Debts may be found by Inquisition, p. 344.

Scire Facias upon it, p. 344.

Pleading to the Scire Facias, p. 345.

Of Melius Inquirendum where the Office found is against the Queen,
p. 346.

Scire Facias, when not necessary on Office Found, p. 346.

Petition of Right and Monstrans de Droit, p. 346.

Conclusion, p. 346.

WHERE debts are alleged to be due to the Queen, which are not of record, (as we have seen bond debts due to the Queen are by statute (a)), the usual course is not for the Queen, in her own name, or in that of her Attorney-General, to sue for the recovery of her debts in the common-law Courts, as between subject and subject (as, however, it would seem she has the undoubted right to do by action of debt) (b); nor yet can she, on any principle, at once resort to the prerogative process of issuing an extent to have execution of a debt, which may be uncertain in amount, until the debt appears to be due by some record (c); but as more consisting with the royal prerogative and dignity, where simple-contract debts, debts on bills of exchange, or debts uncertain in

Mode of recovering simple-contract debts due to the Queen.

(a) See *ante*, last chap.

(b) Bac. Abr. tit. Prerogative, E, 7; Fitz. N. B. 101, A; *Rex v. Gregory*, 2 Lev. 82; in which case the declaration, which ran, "Memorandum, coram domino Rege venit Dominus Rex, &c. et inde productum sectam," was demurred to, on the ground that the writ should have been issued in the

name of the Attorney-General. But the declaration was held good, Hale, C. J., saying, "This is but an unmanly way of declaring for the King." And see 3 Bla. Com. 257; 3 Inst. 136. Com. Dig. tit. Action, B, 1; 2 Tidd's Prac. 8th ed. 1092.

(c) West on Extents, 20.

Inquest of office, what it is.

amount, are due to the Queen, or to a traitor or felon, who by his treason or felony has forfeited all his lands, goods, chattels, and assets to the Queen (*d*), the practice is to resort to the prerogative process of holding an inquisition, or inquest of office, which is "an inquiry made by the Queen's officer, her sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the Queen to the possession of lands or tenements, goods or chattels (*e*).

Origin of inquests of office.

As early as the Statute of Rutland (*f*), it is enacted that commissioners shall be appointed to inquire of the King's debts and to record them, and the whole proceeding directed by this enactment, with the exception of the sheriff's summoning the debtor before the commissioners, which is not now done, is precisely the same as at the present day (*g*).

Their object.

"These inquests of office," says Blackstone (*h*), "were devised by law as an authentic means to give the King his right by solemn matter of record; without which he in general can neither take, nor part from anything (*i*): for it is a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions on bare surmises, without the intervention of a jury" (*k*).

Issuing of the commission to inquire as to Crown debts.

The commission is issued under the seal of the Court by the clerk in Court of the Crown, and is directed to two commissioners, whom it empowers to inquire as well on the oaths of good and lawful men, &c., as by the testimony on oath of any other credible persons (and as some of the precedents run, "by all other ways, means, and methods, whatsoever"), whether the defendant be not indebted to her Majesty in any and what sums of money, and to return the inquisition taken thereon at the re-

(*d*) If the defendant be convicted by confession or verdict, the goods and chattels may be seized into the hands of the Queen without a *seire facias*, or other process against him; Dyer, 151 *b*; Com. Dig. tit. Office, *k*, 12.

(*e*) Finch, L. 323, 4, 5; 3 Bla. Com. 258; Bac. Abr. tit. Prerogative, E, 7; Man. Exch. Prac. 87; and see *Dean v. Reginam*, 15 M. & W. 475.

(*f*) 10 Edw. 1.

(*g*) West on Extents, 21.

(*h*) 3 Bla. Com. 259.

(*i*) Finch, L. 82.

(*k*) Gilb. Hist. of the Exch. 132; Hob. 347. "These inquests of office were more frequently in practice than at present, during the continuance of the military tenures amongst us; when upon the death of every one of the king's tenants an inquest of office was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir, and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantages, as the circumstances of the case might turn out." 3 Bla. Com. 258.

turn of the commission; and it commands the sheriff (*l*) also, in his character of sheriff, to cause a jury to attend before the commissioners; and it empowers the commissioners to summon before them witnesses, and it concludes "by warrant indorsed, and by the Barons." The "warrant indorsed" at the conclusion of the commission, is an indorsement of his name on the commission by a baron, or the Chancellor of the Exchequer, and is the fiat or authority for its issuing" (*m*). The commission issues under the Exchequer seal, and is tested by the Chief Baron, and most commonly issues out of the office of the Queen's Remembrancer, and is signed by him. It is directed, as in other cases, to the sheriff, or to the coroner, or elisors (*n*). The commission is always executed in Middlesex (*o*).

The commission may issue and bear teste (*p*) on any day certain, in term or vacation, and may be made returnable on any day certain in term or vacation; usually, it is returned immediately, as a foundation for the subsequent proceedings (*q*). The inquisition, when returned, becomes a record.

The inquisition, when returned into the Chancery or Exchequer, becomes a ministerial record (*r*), on which a writ of *scire facias* or an extent may be founded (*s*). Originally the jury, by whom inquests of office were found, was of an indeterminate number (*t*), but it must now consist of twelve (*u*). The jury cannot be challenged (*x*).

The inquisition should state how the debt to the Queen is constituted, and not merely that the party is indebted to the Queen (*y*); and as it is the foundation of the subsequent *scire facias*, which may be pleaded or demurred to, it should be nearly as certain as a declaration (*z*). Inquisition should be certain.

(*l*) The sheriff is always the sheriff of Middlesex, commissions to find debts being always executed in Middlesex; West, 21.

(*m*) West on Extents, 22; Man. Exch. Prac. 13.

(*n*) Man. Exch. Prac. 136; West on Extents, 195; 2 Tidd's Prac. 8th ed. 1093.

(*o*) 2 Tidd's Prac. 8th ed. 1093.

(*p*) See 5 & 6 Vict. c. 86, s. 8.

(*q*) Man. Exch. Prac. 14-18, 138; *Rex v. Pearson*, 3 Price, 288; and see 5 & 6 Vict. c. 86, s. 8.

(*r*) Man. Exch. Prac. 87.

(*s*) 2 Tidd's Prac. 8th ed. 1092.

(*t*) F. N. B. 107, C.; 3 Bla. Com. 258.

(*u*) Man. Exch. Prac. 87.

(*x*) 37 Ass. 218, pl. 11.

(*y*) West, 25; 33 Hen. VIII. c. 39, s. 73.

(*z*) West, 25; Hardr. 59; but see Man. Exch. Prac. 18, and *Rex v. Franklin*, 5 Price, 614, where it seems to have been decided that the inquisition may state the party to be indebted to the Crown at the time of the taking of the inquisition, generally, without noticing the amount of the debt, or the period, or the manner in which it accrued.

What debts
may be
found by
inquisition.

Wherever there is such a debt to the Crown as that an action of debt or *indebitatus assumpsit*, might be maintained against the debtor were it due to a subject, such debt may be found under the inquisition for the purpose of issuing a *scire facias* upon it, or an immediate extent on an affidavit, that the debt so found is in danger (a). Thus where a party has incurred such a liability to the Crown on a promissory note, or bill of Exchange, as would subject him to an action at the suit of an individual, such liability may be found under the inquisition as a debt to the Crown (b). So where the rights of a party attainted, outlawed, or *felo de se*, do not appear of record, a commission issues to inquire as to the debts due to him (c), which by his attainder, outlawry, or felony, have become forfeited to the Crown (d). So, although the debt be a debt of record, but some necessary fact, or the amount of the debt remains to be ascertained; as where the steward of a manor neglects to deliver copies of Court roll, the amount of the duty chargeable on each copy being a debt from the steward to the Crown, independently of the penalty, whether he has received such amount or not (e), a commission is necessary to establish the fact, as well as to ascertain the amount (f). So every duty which would form the subject of an action of debt (g), or which might be recovered by the Crown as liquidated damages, in an action of covenant or *assumpsit*, may be returned on the inquisition taken under the commission to find debts (h).

Scire facias
upon it.

The inquisition of the debts found having been returned, becomes, as has been stated, a record (i); upon which may be issued a writ of *scire facias* reciting the inquisition, and founded upon

(a) West, 25; 2 Tidd's Prac. 8th ed. 1104.

(b) West, 28, citing *Bebb's case*.

(c) Man. Exch. Prac. 13; Rast. Ent. 609. So to entitle the Crown to lands by escheat, Co. Ent. 405; *Doe d. Hayne v. Redfern*, 12 East, 96; *Rex v. Copper*, 5 Price, 217; as to goods and chattels forfeited by treason or felony, see 2 Bla. Com. 421; Bunb. 14; and see references to the Form, Append. post.

(d) So after conviction for felony, a *scire facias* shall go against the vill, or any other who has the goods in his custody; St. P. C. 194; Com. Dig. tit. Forfeiture, B 7. A recent instance

may be remembered of a commission issued to find the debts due to Tawell the murderer, after his execution, which are said to have been granted by the Crown to his widow.

(e) 48 Geo. III. c. 149, s. 33.

(f) Man. Exch. Prac. 13.

(g) Although upon a bond conditioned for the performance of covenants; *Rex v. Mosley*, West's Append. of Cases, 325.

(h) Man. Exch. 15; see post, references to form of commission to find debts and inquisition thereon, Append.

(i) See ante, p. 342.

it (*k*), commanding the sheriff to warn the debtor to show cause why the Crown should not have execution of the debts so found; or on an affidavit of danger, and a baron's fiat, an immediate extent may issue to have execution of the debts found (*l*).

The defendant may plead *non indebitatus* to the *scire facias*, ^{Pleading to the scire facias.} alleging that the Crown ought not to have execution because the debt is not due (*m*); under which it would seem, that any denial or discharge of the debt may be given in evidence (*n*), and he may plead to the title shown by the *scire facias*, without other traverse (*o*); or where the *scire facias* does not say that the defendant is indebted, may take issue on some fact which is alleged in the inquisition (*p*). So the Statute of Limitations may be pleaded to a *scire facias* against the drawer of a bill seized in the hands of the Crown debtor under an inquisition (*q*). But neither the Statute of Limitations to a debt due to the Crown, nor a set-off, nor bankruptcy, nor any other plea given by statutes, in which the Crown is not named, can be pleaded (*r*).

The defendant cannot have leave to plead several matters without the consent of the Attorney-General (*s*).

Under the 38 Hen. VIII. c. 39, s. 79, the defendant may plead, or show in bar, or in discharge of his debt, any "good, perfect, and sufficient cause, and matter in law, reason, or good conscience" (*t*); and under this clause of the statute, matter in equity may be pleaded, or brought before the Court by bill in equity (*u*).

The commission ought to be actually returned into the office and filed, before a *scire facias* or extent is issued upon it (*x*). But

(*k*) West, 194; *Dean v. Reginam*, 15 M. & W. 475; S. C., 3 D. & L. 714.

(*l*) 2 Tidd's Prac. 8th ed. 1104; West, 47; *Chapman's case*, West, 38.

(*m*) West, 195; and see 1 Chitty on Pleading, 6th ed. 485, 486.

(*n*) West, 199, 200.

(*o*) Keilw. 200 b, pl. 15; Man. Exch. Prac. 140. But it seems that it is not sufficient for the defendant to traverse the title of the Crown, without also setting out title in himself. Stamford, 63 a; West, 210.

(*p*) West, 200.

(*q*) *Rex v. Morrell*, 6 Price, 24; Man. Exch. Prac. 140; and must always be pleaded when the defendant

intends to avail himself of it as a defence.

(*r*) West, 200.

(*s*) *Rev v. Caldwell*, Forr. 57; *Rex v. Sir C. Peck and others*, Hardr. 189; Man. Exch. Prac. 141; West, 211.

(*t*) West, 201. From this clause this statute is frequently called the Statute of Equity.

(*u*) West, 202; *Sir Thomas Cecil's case*, 7 Rep. 20; *Trallop's case*, Lane, 51; *Sir William Hiz v. The Attorney-General*, Hardr. 176.

(*x*) West, 48, 242; 2 Tidd's Prac. 8th ed. 1093.

if the writ of *scire facias* should be issued before the return day of the commission, this is an irregularity only, and would be cured by appearance (y).

For further rules as to service, and return to the writ, appearing, and pleading to the *scire facias* on Crown debts, and proceeding to trial thereon and costs, see the last chapter, on *scire facias* on Crown bonds, to which the same rules apply (z).

Of *melius inquirendum* where office found against the Queen.

If the office be found against the Queen, a *melius inquirendum*, or further inquiry under the former commission may be awarded, because the Queen cannot traverse the inquisition. But, says Lord Coke (a), "in good discretion, no *melius inquirendum* shall be awarded in such case without sight of some record, or other pregnant matter for the King, to show the former was mistaken. And, by pregnant matter for the King, is meant matter pregnant with evidence of the King's right" (b). But, if on the *melius inquirendum* a verdict is found against the Queen, no further process can be awarded; because, otherwise, there would be no end thereof, *et infinitum in jure reprobatur*. If the *melius inquirendum* be found for the Queen, the defendant may traverse the *scire facias* founded upon it, as he may the *scire facias* on the original inquisition (c).

Scire facias, when not necessary on office found.

Petition of right and *monstrans de droit*.

Wherever the Queen is in possession by virtue of the inquisition, there no *scire facias* to have execution of the inquisition is necessary, and the defendant, if aggrieved thereby, may have his petition of right, which discloses new facts not found by the office, or his *monstrans de droit*, which relies on the facts as found to recover back his possession (d). It would however be travelling out of the province of this work to notice these remedies in detail.

Conclusion.

We have now proceeded through all the cases in which (so far as the author is aware) the writ of *scire facias* is applicable. An inquiry into some of them, has been perhaps more laborious than profitable, as scarcely appropriate to the wants of the present day, or as obsolete in practice. Still, a book professing

(y) *Dean v. Reg.* 15 M. & W. 485.

(z) And see 2 Tidd's Prac. 8th ed. 1126, as to pleading to extents in which the same rules apply.

(a) 8 Co. 168.

(b) Bac. Abr. tit. Prerogative, E 7.

(c) Man. Exch. Prac. 23; *Basett's*

case, Dyer, 248; Dyer, 292 a.

(d) 3 Bla. Com. 260; Com. Dig. Prerogative, D, 81; Com. Dig. Office, K, 12; 9 Co. 98 a; Bro. R. 378; and see 2 Tidd's Prac. 8th ed. 1122; Man. Exch. Prac. 87; and see *ante*, note (d), p. 341.

to treat on this particular subject, and leaving unnoticed any of its branches, could scarcely lay claim to the title of being a complete work, which it has been the author's endeavour, however unsuccessfully, at much pains to strive to make this.

The residue of the volume will be devoted to general practice, points on pleading, and amendment.

BOOK THE FOURTH.

CHAPTER I.

OF PLEADING AND PRACTICE ON SCIRE FACIAS GENERALLY.

Object of Book IV., p. 348.

Of the Writ of Scire Facias and Declaration on, generally, p. 349.

Quashing the Writ, p. 349.

Pleas to, generally, p. 352.

Practice on, generally, p. 354.

Costs, p. 357.

To recover Demands arising after Judgment on Bonds, p. 358.

To levy Residue of Debt after Eviction under an Elegit, p. 359.

Ad Rehabendam Terram, p. 359.

Quare Restitutionem non, p. 359.

Against Members of Joint-Stock Banking Companies, p. 359.

Declarations in Scire Facias against, p. 359.

The same Rules apply as to suing a Shareholder of a Company under the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 36, as have been held to apply to the *Banking Act*, 7 Geo. IV. c. 46, s. 13, p. 361.

Pleas to Scire Facias against Member of a Joint-Stock Company, p. 363.

On Marriage of Feme Plaintiff or Defendant, p. 365.

In Cases of Bankruptcy or Insolvency, p. 365.

In Case of Death of Plaintiff or Defendant, p. 366.

On Judgment of Assets quando, p. 367.

On a Bill of Exceptions, p. 367.

Ad Audiendum Errores, p. 367.

To revive a Judgment in Ejectment, p. 368.

Against Sheriff by Execution Creditor, p. 368.

To recover Debts found due to Outlaw and on Pardon of Outlawry, p. 368.

To repeal Letters Patent, p. 368.

To have Execution on Recognizances at Common Law, p. 369.

On Recognizances of Special Bail, p. 370.

On Recognizances of Bail in Error, p. 370.

Against Pledges in Replevin, p. 371.

On Bond to the Crown, p. 371.

On Inquests of Office, p. 372.

Object of Book IV.

It is intended in the present book to give a short review of the pleading rules applicable to the writ of *scire facias* generally; after which the decisions on points of pleading connected with the various subjects of the foregoing chapters will be briefly collected in the order in which those chapters are arranged. This, it is hoped, will facilitate the references which may be required to points of pleading exclusively, and to the rules applicable to declarations on, and pleas to, the writs of *scire facias*. The rules as to

amendment will complete the book. For the general law and decisions on each subject, the reader is referred to the respective chapters thereon in other parts of the volume.

In *Blake v. Dodmead et Ux.* (a), it was said "that there was no such thing as a declaration on a *scire facias*, but that the declaration and writ are synonymous, and the plea is to the writ." The declaration, in fact, sets out the writ, and is in the same form as the writ (b), with a proper inducement; and, though called a declaration, is merely a mode of entering the writ on record (c).

Of the writ of *scire facias* and declaration on, generally.

In one case a *scire facias*, disclosing the facts upon which it was founded, and requiring an answer from the defendant, was said to be in the nature of a declaration (d).

The plaintiff's attorney must have a new warrant and retainer in order to sue out the writ, because it is in the nature of an action (e); and the judgment being presumed to have been satisfied the authority consequently expires (f).

It has been held that a *scire facias* being a judicial writ, shall not abate for want of form; and, therefore, where the words *si sibi viderit expedire* were left out in a *scire facias*, yet the writ was held sufficient (g). And being a judicial writ, by the 18th of Eliz. c. 14, s. 1, it may be amended for lack of form after verdict (h). And the Courts will, in their discretion, allow an amendment in the declaration on the *scire facias*, unless the defendant can show that he would sustain any disadvantage thereby (i).

If the proceedings on the writ have not been conformable to the practice of the Court, the plaintiff may move to quash his own writ on payment of costs (k). The rule is *nisi* only in the first instance (l). And if the writ be in such a form that the defendant cannot take issue upon it, nor demur to it, the

Quashing the writ.

(a) 2 Stra. 775.

(b) *Bank of Scotland v. Fennick*, 1 Exch. 796, *per* Rolfe.

(c) *Nunn v. Claxton*, 3 Exch. 715; and see 2 Tidd's Prac. 8th ed. 1180, 1181.

(d) *Vaughan v. Floyd*, 1 Sid. 406; 2 Tidd's Prac. 8th ed. 1140; *ante*, p. 11.

(e) *Treviban v. Lawrence*, 2 Lord Raym. 1048; *Herd v. Buratowe*, Cro. Eliz. 177; *ante*, p. 13; *Atwood v. Burr*, 2 Lord Raym. 1252; 2 Wms. Saund. 6th ed. 71 a.

(f) *Payne v. Chuter*, 1 Roll. 365;

Lush, Prac. 220.

(g) Bac. Abr. tit. Scire Facias, D; Lucas, 270; *sed vide* 3 Keb. 190; 2 Lut. 1281; Sid. 406.

(h) *Wheadon v. Smagg*, Cro. Jac. 372; *Comyn v. Kyneto*, Cro. Jac. 162.

(i) *Thorpe v. Hook*, 1 Dowl. 504; *Holland v. Phillips*, 10 Ad. & E. 149; and see 2 Tidd's Prac. 8th ed. 1176; and see *post*, ch. on Amendments.

(k) *Ade v. Stubbs*, 4 Dowl. 282; and see Bac. Abr. tit. Scire Facias, E; and see *ante*, p. 26.

(l) *Oliverson v. Latour*, 7 Dowl. 605.

defendant may move for a rule calling on the plaintiff to show cause why the writ should not be quashed; as where in a *scire facias* against a member of a joint-stock banking company, on a judgment obtained against the public officer, the writ alleged that the defendant was "a member at the time of the commencement of the action in which the judgment was obtained, and at the time of the recovery and giving of the judgment, and from thence continually has been, and still is a member" (m).

It has been said that a *scire facias* is in the nature of a bill in chancery, and that the same certainty is not required therein as by the common law (n). But modern cases show that it may be specially demurred to for want of certainty, and that the same rules are applied to it as to any other declaration (o); and in like manner the pleas to the *scire facias* may be specially demurred to (p).

It has also been said that a *scire facias* ought to be as short as possible (q), and therefore it is sufficient though it be as general as the record upon which it is founded (r); and an immaterial variance from the record does not prejudice, as an omission in the style of the King (s).

But it must recite the judgment that was given (t), and before what judge (u); and if the record be special, it is safe to recite it as it was pleaded (x). It must be against all the defendants together (y), or it may issue against each severally (z); but when issued against joint defendants, the declaration against one only would be irregular (a), and such a variance between the process and declaration may be taken advantage of by applying to the Court (b). It need not recite all the proceedings upon which the judgment was given, but the judgment only (c).

(m) *The Governor and Company of the Bank of Scotland v. Fenwick*, 1 Exch. 792.

(n) Latch. 112; Bac. Abr. tit. Scire Facias, D.

(o) *Nunn v. Claxton*, 3 Exch. 712; S. C. 6 D. & L. 637; *Ness v. Fenwick*, 2 Exch. 598. So on a *scire facias* to repeal a patent, the defendant may demur to the *scire facias*, if the matter alleged be not sufficient to repeal the patent. *Rex v. Sir Oliver Butler*, 3 Lev. 221.

(p) *Ness v. Bertram and another*, 4 Exch. 196.

(q) Prac. Reg. 496.

(r) Mod. Ca. 296; Com. Dig. Tit.

Pleader, 3, L. 3.

(s) *Panton v. The Earl of Bath*, 3 Mod. 227; Com. Dig. tit. Pleader, 3, L. 3.

(t) *Preston v. Pertion*, Cro. Eliz. 817.

(u) Pr. Reg. 497; *Gray v. Hart*, Sal. 517.

(x) *Soper et Ux. v. Ludlow*, Dy. 344.

(y) *Panton v. Hall*, Sal. 598.

(z) *Gee et Uxor v. Fane*, 1 Lev. 226; see ante, 21.

(a) *Swainsbury v. Pringle*, 10 B. & C. 751; see ante, p. 22.

(b) *Fowler v. Rickerby*, 9 Dowl. 692.

(c) *Gold and others v. Strode*, Carth. 149; ante, p. 19.

It must be brought in the same county where the *venue* was laid in the original action (*d*), and must issue out of, and be returnable in, the Court in which the original action was depending (*e*), and where the judgment was given if it remains there (*f*). The record of the judgment must be in Court (*g*).

It must pursue the terms of the judgment, and a variance from it is error (*h*).

No *capias* can issue upon the *scire facias* to arrest a defendant, on an affidavit before a judge of his presumed intention to quit England (*i*).

Proceedings in *scire facias* on a judgment are within 1 Reg. Gen. Hil. T. Will. IV. (Pleading Rules), and consequently must be entitled of a day certain instead of a term (*k*).

The time of limitation begins to run from the date of the revived judgment in *scire facias*; for such judgment is a new judgment (*l*).

The limitation of a judgment on *scire facias*, as on any other judgment, is twenty years (*m*).

If the original judgment be reversed, the judgment in *scire facias* will be reversed in like manner (*n*).

If execution be sued out on a judgment more than a year old without reviving it by *scire facias*, it is voidable only, and not void (*o*); and a defendant may move to set aside such execution for the irregularity (*p*).

If the *scire facias* has been sued out irregularly, the irregularity is waived by the defendant's appearance (*q*).

If the plaintiff has revived his judgment by *scire facias*, and does not sue out execution within a year after such revival, he must again revive the judgment by *scire facias*, or action on the

(*d*) 2 Tidd's Prac. 8th ed. 1175; *Musgrave v. Wharton*, Hob. 6; *Phillips v. Smith*, 2 Dowl. N. S., 688; *ante*, p. 18.

(*e*) 2 V. Wms. Saund. 6th ed. 72 a; *ante*, p. 19; 2 Chitty's Arch. Prac. 8th ed. 1025.

(*f*) *Ante*, p. 19.

(*g*) Com. Dig. tit. Pleader, 3, L, 3; *ante*, p. 19.

(*h*) *Marav. Quin*, 6 T. R. 5; *ante*, p. 20.

(*i*) See *ante*, p. 22.

(*k*) *Collins v. Beaumont*, 5 Dowl. P. C. 700; 2 Wms. Saund. 6th ed. 72 aa.

(*l*) *O'Brien v. Ram*, 3 Mod. 186; *ante*, p. 13.

(*m*) 3 & 4 Will. IV. c. 42, s. 3; see *ante*, pp. 14, 29.

(*n*) *Dr. Drurie's case*, 8 Co. 141; see *ante*, p. 22.

(*o*) *Blanchenay v. Burt and others*, 4 Q. B. 707; *Ex parte Henry Hawkesbury*, C. P. Mich. T. 1850; see *ante*, p. 25.

(*p*) *Walker v. Thelluson*, 1 Dowl. N. S. 277; *ante*, p. 25.

(*q*) *Pickman v. Robson*, 1 B. & A. 486; *ante*, p. 26.

judgment (*r*). The second *scire facias* must then recite the previous *scire facias*, and the proceedings which have been taken (*s*).

If the *scire facias* be unnecessarily sued out, the plaintiff must proceed to judgment upon it before he can issue execution (*t*).

An interlocutory judgment, if no proceedings are taken upon it for more than a year, must be revived by *scire facias* like any other judgment (*u*).

If a plaintiff suing out a *scire facias* be under any legal disability, he may be nonsuited (*x*).

A writ of error lies on a *scire facias* to the Exchequer Chamber (*y*).

The omission to sue out a *scire facias*, to revive a judgment when required by lapse of time, is a ground of error which is apparent on the face of the record (*z*).

Pleas to,
generally

It has been held that there is no doubt that a *scire facias* is an action, whether considered as an original or a judicial writ; and such as the defendant may plead to (*a*), and on that ground a plea to a *scire facias* must conclude "if the plaintiff ought to have or maintain his action" (*b*).

And on this ground a plea of payment with other pleas to a *scire facias*, has been allowed under the statute 4 Anne, c. 16 (*c*); and the modern practice is to allow several pleas in *scire facias* (*d*).

A plea to a *scire facias* should be to the writ and not to the declaration (*e*).

A man may plead in bar or in abatement to a *scire facias* as well as to other actions (*f*).

(*r*) 2 Tidd's Prac. 8th ed. 1158; see *ante*, p. 27.

(*s*) *Ante*, p. 27.

(*t*) *Ante*, p. 27.

(*u*) *How v. Acton*, 12 Mod. 500; *ante*, pp. 27, 28.

(*x*) *O'Mealey v. Wilson and another*, 1 Camp. 483; *ante*, p. 28.

(*y*) *Needbit v. Rishton*, 9 Ad. & E. 426; *ante*, p. 29.

(*z*) *Goodtitle, d. Murrell, v. Badtitle*, 9 Dowl. 1009; *ante*, p. 29.

(*a*) Bac. Abr. tit. Scire Facias, E; Com. Dig. tit. Pleader, 3, L, 3. Where to a *scire facias* to show cause why the plaintiff should not have execution on a judgment, the defendant pleaded that the plaintiff ought not to have his action, instead of ought not to have ex-

ecution, the plea was held well enough, *Grey v. Jones*, 2 Wils. 251; *O'Brien v. Ram*, 3 Mod. 186; *ante*, p. 13.

(*b*) *Fenner v. Evans*, 1 T. R. 267; Com. Dig. tit. Pleader, 3, L, 3.

(*c*) *Phillipson, P. O. v. Tempest*, 1 Dowl. & L. 209.

(*d*) *Giles v. Hull*, 1 Exch. 704, per Parke, B.

(*e*) 2 Wms. Saund. 209 *k, d, n*. (1); *Davies v. Thompson*, 14 M. & W. 161; *Whitling v. Des Auges*, 3 C. B. 910; *Reg. v. Betts and another*, 19 L. J., N. S. Q. B. 532.

(*f*) *Alice v. Gale*, 10 Mod. 112; 2 Inst. 470; 2 Wms. Saund. 6th ed. 72 *bb*; *ib. 9 e, n. 10, 11 h, n. 19*; Com. Dig. tit. Pleader, 3 L, 10; *Rex v. Mann*, 1 Stra. 146; and see *ante*, p. 13, n. (y).

Thus to a *scire facias* on a judgment, the defendant may plead *nil tiel record* (*g*) or payment since the statute 4 Anne, c. 16, s. 12 (*h*), or a release (*i*), or that the debt and damages were levied on a *fi. fa.* (*j*), or that his lands were extended for them upon an *elegit* (*k*), or his person taken in execution on a *capias ad satifaciendum* (*l*). So a *terretenant* may plead in bar to a *scire facias*, anything which shows his lands not liable to execution (*m*), or nonjoinder of other *terretenants* (*n*).

A defendant may plead to a *scire facias*, anything which has been done under the original judgment which exonerates him from liability (*o*).

But the mere fact of an execution having been issued during the year is no answer to a *scire facias*, brought after its expiration, though satisfaction of the demand under such execution would be an answer in proportion to the amount recovered (*p*).

The rule of law is well settled that you cannot plead to a *scire facias* any matter which might have been set up as a defence to the original action (*q*), otherwise there would be no end of the proceedings (*r*).

(*g*) Com. Dig. Pleader, 5 L. 15.

(*h*) *Phillipson v. Tempest*, 1 Dowl. & L. 209; *Giles v. Hutt*, 1 Exch. 704; see the sect. *ante*, p. 35.

(*i*) The tenant or defendant may plead divers matters to a *scire facias* after the judgment given, to bar the plaintiff of execution, as outlawry, a release of actions, &c. 2 Inst. 470.

(*j*) *Mounteney v. Andrews*, Clift. 675; 4 Leon. 194.

(*k*) *Glascock v. Morgan*, Dyer, 299 b; 1 Lev. 92.

(*l*) *Scott v. Peacock*, 1 Salk. 271; *Holmes v. Newlands*, 5 Q. B. 370; 2 Wms. Saund. 6th ed. 72 cc.

(*m*) *Jefferson v. Moreton*, 11 A; 2 Wms. Saund. 6th ed. n. 19.

(*n*) Bac. Abr. tit. *Scire Facias*, C. 5.

(*o*) *Holmes v. Newlands*, 5 Q. B. 370; Com. Dig. Pleader, 3 L. 15; *Clek v. Withers*, 2 Ld. Raym. 1075.

(*p*) *Holmes v. Newlands*, 5 Q. B. 634.

(*q*) *Bradley v. Eyre*, 11 M. & W. 451; *Phillipson v. The Earl of Egremont*, 6 Q. B. 604; *Allens v. Andrews*, Cro. Eliz. 283; *Holmes v. Newlands*, 5 Q. B. 367; *Middleton v. Hill*, Cro. Eliz. 588; *Rowe v. Bellaneys*, 1 Sid. 182; *West v. Sutton*, 1 Salk. 2; 2 Ld. Raym. 853; *S. C. Bush v. Gower*, 2 Stra. 1043; *Cook v. Jones*, Cowp. 727; 2 V. Wms. Saund. 6th ed. 72 dd; *Wheatley v. Lane*, 1 Wms. Saund. 6th ed. 219 c, n. It is a general rule that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it either in another action founded on it, or in a *scire facias*. *Rock v. Leighton*, 1 Salk. 310; *Ramsden v. Jackson*, 1 Atk. 292; *Earle v. Hinton*, 2 Stra. 732; *Skelton v. Howling*, 1 Wils. 258; 2 Tidd's Prac. 8th ed. 1184; *ante*, p. 145.

(*r*) *Bradley v. Urquhart*, 11 M. & W. 460; S. C., 2 D. N. S. 1042.

Thus a plea to a *scire facias* (on a judgment by the original plaintiff) of the plaintiff's bankruptcy, and that the causes of action in the original suit accrued before the plaintiff became bankrupt, and which does not state whether the judgment was recovered before or after the bankruptcy, is bad, as it does not appear but that the bankruptcy might have been pleaded in bar to the original action (*s*).

But if the judgment on which the *scire facias* has issued has been confessed on a warrant of attorney, so that the defendant had no opportunity of pleading any defence to the original action, which he may have, and is without relief, the Court will interpose and direct an issue to try such defence as the defendant might have pleaded to the original action (*t*).

To a *scire facias* brought by the second assignee of a judgment, a plea of payment to the first assignee was held bad on special demurrer for not averring the payment to have been made after the assignment to him (*u*).

Where judgment has been obtained on a joint and several bond against principal and surety, and the debt and costs have been levied from the surety, the surety is entitled to have an assignment of the judgment debt in order to reimburse himself from the principal, and the principal would have no defence to a *scire facias* on the judgment brought against him by the surety as assignee of the judgment (*x*).

It is not necessary for a party in a *scire facias* to return the demurrer book, and therefore a judgment signed for not returning it is irregular (*y*).

The sheriff, on the return of the *scire facias*, either returns *scire feci* or *nihil*; that is, that he has given notice to the defendant, or that he has nothing by which he can make known to him (*z*).

Practice on,
generally.

Where the sheriff returns *nihil* the plaintiff must sue out a second or *alias* writ of *scire facias*, commanding the sheriff as

(*s*) *Baylis v. Hayward*, 4 Ad. & E. 256.

(*t*) *Cooke v. Jones*, Cowp. 727; *Greenslade v. Vaughan*, 8 Dowl. 687.

(*u*) *Purdon v. Purdon*, 1 Hud. & Br. Rep. Ir. 229.

(*x*) *Dillon v. Farrell*, Batty's Rep. Ir. 669; *Dowbiggin v. Bourne*, 1

Young's Rep. 111; *sed vide* 2 Y. & C. 462.

(*y*) *Baylis v. Hayward*, 3 Dowl. 533.

(*z*) See the form, Thes. Brev. 227, 263, 228, 273; Tidd's Prac. Forms, 455; 2 V. Wms. Saund. 72 6th ed.

Before he was commanded (a). And formerly, if the sheriff also returned *nihil* to the second writ, and the defendants did not appear, there was judgment against them, by default (b), two *nihils* being deemed equivalent to a *scire feci* (c). And in a *scire facias* to revive a judgment against the party himself one *nihil* was held sufficient (d). The intent of the *scire facias* being to give notice to the defendant, which by the general practice of suing out two *scire facias* and returning *nihil* to each was defeated, the Courts made the rule of H. T. 2 Will. IV. r. 81, which directs that "no judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*" (e). The language of the rule is general, and applies to proceedings by *scire facias* generally (f). It has been held under this rule that the plaintiff must now either issue two writs of *scire facias*, or summon the defendant (g), and the Court will not allow the plaintiff to sign judgment on the return of *nihil* to two writs of *scire facias*, unless it appears that endeavours have been made to give the defendant notice (h). But it is only necessary to show that something has been done to convey notice to the party of the proceeding against him; and where reasonable notice was given to a defendant of the proceeding by *scire facias* against him, although he was residing abroad, the Court permitted judgment to be signed on the *scire facias* after eight days from the return (i).

By rule 5 Geo. II. E. T. explained by the Court, in *Wilson v. Farr* (k), every writ of *scire facias* of which notice shall be given to the defendant shall be left at the sheriff's office four days before the return, exclusive of the return day; and every writ of *alias scire facias* shall be left four days exclusive as well of the day on which it is lodged as of the return day; the days must be the

(a) 4 Inst. 472; *Randal v. Wade*, Cro. Jac. 59.

(b) *Barret v. Cleydon*, Dyer, 168 a; Com. Dig. Pleader, 3 L, 8, 9.

(c) *Ratcliffe's case*, Dyer, 172 a; 2 Wms. Saund. 6th ed. 72 x.

(d) *Barrett v. Cleydon*, Dyer, 168 a.

(e) Jervis's New Rules, 82; and see *ib.* n. (c).

(f) *Jackson v. Elam*, 1 Dowl. 515.

(g) *Wood v. Moseley*, 1 Dowl. 513.

(h) *Sabine v. Field*, 1 Cr. & M. 466; and see *Lockwood v. Orme*, and *Newton v. Flight*, cited in Jervis's New Rules, 83, n. (c); 2 Chitty's Arch. Prac. 8th ed. 1028.

(i) *Weatherhead and others v. Landles*, 5 Dowl. 189; and see *Armitage v. Rigbye*, 5 Ad. & E. 76.

(k) 4 B. & A. 537.

last four days (*l*). The four days must be exclusive of Sundays and other days when the sheriff's office is not open for the purpose of searching (*m*), i. e. four juridical days (*n*).

A *scire facias* upon a judgment in an action commenced by a writ of summons, or upon a recognizance of bail, must be made returnable on a day certain in term (*o*). In all other cases it may be made returnable on a general return day (*p*).

If the writ be returnable on a general return day there must be fifteen days between the teste and return (*q*). If it be intended to sue out two writs there must be fifteen days inclusive (*r*) between the return of the second and the teste of the first writ (*s*). The number of days between the teste and return of each writ is immaterial (*t*).

As to the practice when the judgment is more than seven years old, see *ante* (*u*).

The sheriff must indorse on every *scire facias*, the day of the month on which it was left with him (*x*). If there be any objection to the proceedings in *scire facias*, on the ground that the writ has not lain a sufficient number of days in the sheriff's office, the defendant should apply to set aside the proceedings thereon (*y*).

The defendant may be summoned at any time before the return of the *scire facias* or even upon the return day, provided it be before the rising of the Court (*z*). The Court or a judge will determine on the sufficiency of the summons if disputed (*a*); and if insufficient, the proceedings on the *scire facias*, may be set aside even after the sheriff's return of *scire feci* (*b*).

(*l*) *Trouty v. Hermer*, 4 T. R. 583;
Williams v. Mason, 1 East, 89, n.; 2
Wms. Saund, 6th ed. 72 *x*.

(*m*) 2 Wms. Saund. 6th ed. 72 *x*,
n. (*c*).

(*n*) *Frazer v. Miller*, 1 Dowl. 141;
Anon. 1 Dowl. 142.

(*o*) Chit. Arch. Prac. 8th ed. 1025;
Eden v. Wills, 2 Ld. Raym. 1417; 2
Stra. 694, S. C.

(*p*) R. E. 5 Geo. II. r. 3, *a*.

(*q*) 2 Chit. Arch. Prac. 8th ed.
1025.

(*r*) *Hicks v. Jones*, 2 Stra. 765;
Goodwin v. Peck, 2 Salk. 509.

(*s*) R. T. 8 Will. III. r. 1 *a*; E. 5
Geo. II. r. 3 *a*; *Goodwin v. Beakhean*,

Carth. 468; 12 Mod. 215, S. C.;
Combe v. Cuttill, 10 Moore, 535.

(*t*) *Elliot v. Smith*, 2 Stra. 1139.

(*u*) Pp. 14, 30; 2 Chit. Arch. Prac.
8th ed. 1026.

(*x*) R. E. 5 Geo. II. n. 3.

(*y*) *Williams v. Brown*, 2 Dowl. 749.

(*z*) *Clarke v. Bradshaw*, 1 East, 86;
Lewis v. Pyme, 1 C. & M. 771; 2
Dowl. 133, S. C.; *Webb v. Harvey*, 2
T. R. 757; *O'Brian v. Frazier*, 1
Stra. 644; Chit. Arch. Prac. 8th ed.
1028.

(*a*) *Wright v. Page*, 2 Bla. Rep.
837.

(*b*) *Pool v. Wills*, 2 T. R. 758, n.; 2
Chit. Arch. Prac. 8th ed. 1028.

If on the return day the sheriff have returned *scire feci*, the plaintiff may enter a memorandum for a rule to appear with the Master; and if, at the expiration of the rule, which is a four-day rule (c), the defendant has not entered an appearance, the plaintiff may enter the proceedings on the roll and sign judgment (d).

If the defendant have not been summoned, and the sheriff has returned *nihil* to the writ, the plaintiff may enter a four-day rule to appear and plead with one of the Masters (e). Sundays and holidays are excluded from the computation of the time given, although intermediate days (f). If the defendant has not entered an appearance in eight days from the return day the plaintiff may apply to the Court, within a reasonable time after the expiration of the eight days (g), to sign judgment on an affidavit stating the issuing of the *scire facias*, the sheriff's return of *nihil*, and that notice had been given to the defendant of the proceedings against him; or that proper endeavours had been made to give him notice without effect (h). The rule is absolute in the first instance.

If the defendant has not been summoned, he may notwithstanding the judgment against him have advantage of any matter he might have pleaded to the *scire facias*, either on *audita querela* (i), or by motion to the Court (k).

When judgment is signed the proceedings in *scire facias* must be entered upon the roll and execution awarded (l).

A motion cannot be made in arrest of judgment on a *scire facias* after the first four days of term (m).

Before the statute 3 & 4 Will. IV. c. 42, the plaintiff was not entitled to costs on a *scire facias* until after plea pleaded (n).

(c) *Wathen v. Beaumont*, 11 East, 272; 2 Chit. Arch. Prac. 8th ed. 1029.

(d) And see the practice in 2 Chit. Arch. Prac. 8th ed. 1029.

(e) *Wathen v. Beaumont*, 11 East, 272; 2 Chit. Arch. Prac. 8th ed. 1029.

(f) *Wathen v. Beaumont*, *ubi supra*; *Anon.* 1 Dowl. 142; *Scott v. Larkins*, 1 Dowl. 202.

(g) *Wood v. Moseley*, 1 Dowl. 513.

(h) *Wimall v. Cook*, 2 Dowl. 173; *Saunderson v. Brown*, 6 Dowl. 9.

(i) 2 Chit. Arch. 8th ed. 1030 *Lapton v. Collingwood*, 1 Salk. 62.

(k) *Ludlow v. Lennard*, 2 Ld. Raym. 1295; *Anon.* 1 Salk. 93; *Dodd v. Beckman*, 1 Ld. Raym. 445; *Wharton v. Richardson*, 2 Stra. 1075; *Holt v. Frank*, 1 M. & Sel. 199.

(l) 2 V. Wms. Saund. 72 aa.

(m) *Rex v. M'Leod*, 3 Price, 203.

(n) 2 Chit. Arch. Prac. 8th ed. 1032; *Pocklington v. Peck*, 1 Stra. 638; Saund. 72 a; 8 & 9 Will. III. c. 11, s. 3.

But by the 84th sect. of that Act, "in all writs of *scire facias* the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined." By the 8 & 9 Will. III. c. 11, s. 3, if the plaintiff be nonsuit or discontinue, or if a verdict pass against him, the defendant shall be entitled to costs (o).

See, generally, as to the rules of practice on a *scire facias* to revive a judgment, *ante*, book i. ch. ii.

SCIRE FACIAS TO RECOVER DEMANDS ARISING AFTER
JUDGMENT ON BONDS.

To recover
demands
arising after
judgment
on bonds.

Under the statute 8 & 9 Will. III. c. 11, for breaches of covenants or agreements, or non-payment of an instalment of an annuity secured by bond, by which the bond has become forfeited and judgment has been obtained for the forfeiture, the judgment remains as a further security, and the plaintiff may issue a *scire facias* to revive the judgment for further breaches, or non-payments, calling on the defendant to show cause why execution should not issue for those claims; and the plaintiff must assign the breaches in the declaration or replication, or suggest them on the roll (p).

The *scire facias* must recite so much of the proceedings in the former action as to make it appear that the judgment is warranted by the statute (q), and the same proceedings must be pursued in the *scire facias* as in the original action (q).

But nothing can be assigned or suggested as a breach which could have been assigned or suggested to the original action (r).

The statute of 8 & 9 Will. III. is compulsory in all cases within it, and the plaintiff must assign or suggest breaches on the record (s).

A set-off may be pleaded to a *scire facias*, assigning a further breach after judgment, covering the amount of the interest or annuity accruing due (t).

The plaintiff may, under the statute of 8 & 9 Will. III., assign as many breaches as he may think fit (u).

(o) See *Brewster v. Meaks*, 2 Dowl. 612.

(p) *Quin v. King*, 1 M. & W. 45; *ante*, pp. 38, 39.

(q) 1 V. Wms. Saund. 58 h, n.

(r) *Harrop v. Armitage*, 12 Price; see *ante*, p. 40.

(s) *Hardy v. Bern*, 5 T. R. 538; *Roles v. Rosewell*, 5 T. R. 636; *ante*, pp. 43, 44, 45.

(t) *Collins v. Collins*, 2 Burr. 820; *ante*, p. 43.

(u) *Plomer v. Ross*, 5 Taunt.; see *ante*, p. 45.

If the defendant plead matter admitting and excusing the non-performance of the covenants, &c., the plaintiff must traverse the special matter only in his replication and enter a distinct suggestion of breaches under the statute, and not assign them in his replication, as the replication would be bad for duplicity (x), as the statute does not authorize any other double pleading than the assignment of breaches.

See generally as to the practice, *ante*, book i. chap. iii.

TO LEVY RESIDUE OF DEBT AFTER EVICTION UNDER AN ELEGIT.

See generally as to the law and practice, book i. chap. iv. p. 47
(*The Mayor, Aldermen, and Burgesses of the Borough of Poole v. Whitt*, 15 M. & W. 571).

To levy residue of debt after eviction under an *elegit*.

AD REHABENDAM TERRAM.

See the practice generally, *ante*, book i. chap. v. p. 58 (*Price v. Varney*, 3 B. & C. 733).

Ad rehabendam terram.

QUARE RESTITUTIONEM NON.

See the practice generally, *ante*, book i. chap. vi. p. 64.

Quare restitutionem non.

AGAINST MEMBERS OF JOINT-STOCK COMPANIES.

See the practice generally, *ante*, book ii. chap. ii. p. 107.

In an action by a joint-stock company in the name of their public officer, who, after issue has been delivered, has died, and another officer has been appointed in his place, it is irregular to enter a suggestion upon the record of the nominal plaintiff's death and of the appointment of another nominal plaintiff, without the authority of the Court, and without giving the defendants opportunity to traverse the facts stated. The suggestion ought to be entered on the plea roll (z).

Against members of joint-stock banking companies.

A declaration on *scire facias* on a judgment obtained against the public officer of a joint-stock banking company against a shareholder of the company must state the debt recovered against the public officer to have been due and owing from the company to the plaintiff, or it would be bad on special demurrer, as the declaration does not show that the debt was a debt of the company (a).

Declarations in *scire facias* against.

(x) *De la Rue v. Stewart*, 2 N. R. 362; *Webb v. James*, 8 M. & W. 645; see *ante*, pp. 45, 46.

Sutherland and others, 1 L. M. & P. 159.

(a) *Ness v. Fenwick*, 2 Exch. 598;

(z) *Barnewall, Public Officer*, v. *ante*, p. 141.

A *scire facias* against members of a joint-stock banking company, under the 7 Geo. IV. c. 46, to have execution against members of the company, at the time of the contract on a judgment obtained against a public officer, ought to state the prior execution against the members at the time of the execution, which is a condition precedent, and is necessary to warrant the *scire facias* against a member at the time of the contract (a). And the question, as to the defendant's being a shareholder at the time of the contract is a matter to be tried on the *scire facias* (b).

In a declaration in *scire facias* against a member for the time being of a joint-stock banking company, under 7 Geo. IV. c. 46, on a judgment obtained against a public officer, it is sufficient to describe the defendant as "now a member of the said co-partnership" (c).

A *scire facias* on a judgment recovered against the public officer of a banking copartnership, which alleged that the defendant was a member "at the time of the commencement of the action when the judgment was obtained, and at the time of the recovery and giving of the judgment, and from thence continually has been and still is a member," was quashed by the Court on motion (d).

It should accurately set forth to which class of shareholders the defendant belongs (e).

On motion for *scire facias* against former members of a joint-stock banking company, under 7 Geo. IV. c. 46, on a judgment obtained against the public officer, it must be shown that substantial and *bonâ fide* endeavours have been made to obtain an available execution against present members (f).

A declaration in *scire facias* which stated that, by the judgment of the Court, the plaintiff recovered against B., one of the public officers of certain persons united in co-partnership, "for the purpose of carrying on" the business of bankers in England, according to the 7th Geo. IV. c. 46, a debt of 3000*l.* whereof B., as such public officer, was convicted, as by inspecting the rolls of our

(a) *Bank of England v. Johnson*, 3 Exch. 604, per Parke, B.; *ante*, p. 138.

(b) *Ibid.* p. 598; S. C., 6 D. & L. 458.

(c) *Nunn v. Claxton*, 3 Exch. 712; S. C., 6 D. & L. 637; *ante*, p. 141.

(d) *The Governor and Company of the Bank of Scotland v. Fenwick*, 1 Ex. h. 792; 5 D. & L. 377, S. C., and see *Esdaile, Public Officer, v. Trustwell*,

1 Exch. 371; 5 D. & L. 219, S. C.; *Ricketts and others v. Bowhay*, 3 C. B. 889.

(e) See *ante*, p. 140.

(f) *Bardley v. Law*, 12 Ad. & E. 802; *Dodgson v. Scott*, 2 Exch. 470; *Field v. M'Kenzie, Public Officer*, 5 D. & L. 172, 348; *Harvey, Public Officer, v. Scott*, 11 Q. B. 92; and see *ante*, p. 132.

Exchequer appears. Plea, that S. was a member of the co-partnership, and that the defendants were the executors of S., and as such entitled to the share of S., and members of the co-partnership, by reason of their shares and interest as executors, and not otherwise, and that they had fully administered the goods of S., was held to be good on general demurrer, although it did not allege that the co-partnership were actually carrying on the business of bankers. The plea was also held to be bad on special demurrer, as amounting to an argumentative denial that the defendants were members (g).

It has been very recently held, in the Court of Common Pleas, (the case is not yet reported,) that proceedings against a shareholder under the Companies Clauses Consolidation Act, the 8 Vict. c. 16, s. 36, in order to have execution against a shareholder on a judgment obtained against the secretary of the company must be by *scire facias*. That section provides, "that if any execution, either at law or equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: Provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court after sufficient notice in writing to the person sought to be charged; and upon such motion such Court may order execution to issue accordingly." And it was sought to obtain an order of the Court for an execution to issue against one George Emery, on motion. But the Court held that the words of this section were, in effect, the same as the words of the 18th section of the Banking Act, (7 Geo. IV. c. 46,) under which it had been held that the proper course of proceeding was by *scire facias*, and that the motion must be for a *scire facias* (h). The effect of this decision is most important, as bringing a great number of joint-stock companies within the operation of the rules laid down under the Banking Act. This decision was, two days afterwards, brought before the notice of the Court of Exchequer, on a motion for a *scire facias* on a judgment obtained against the same company to have execution

The same rules apply as to suing a shareholder of a company under the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26, as have been held to apply to the Banking Act, 7 Geo. IV. c. 46, s. 13.

(g) *Ness v. Bertram and another*, *Great Southern and Western Railway Company*, Mich. T., C. P. 1850.
4 Exch. 194.

(h) *Hitchins v. The Kilkenny and*

against a Mr. Emery, a shareholder of the company (i). The motion was opposed on the ground that sufficient means had not been taken to obtain execution against the goods of the company. The Chief Justice said the application was made under the 8th of Vict. c. 16, s. 36, by virtue of which act the Court had the power to award execution. The Court were told that the execution must be by *scire facias*. As the execution must issue upon certain conditions, it was manifest that the Court must have the power to investigate such matters as the foundation of the *scire facias*, which might be traversed; and it seemed to him that these matters could be far better investigated before a jury on the traverse of the *scire facias*, than by the Court directing an issue to try the facts. But he thought it discretionary in the Court whether an execution should issue or a *scire facias*. He stated this that he might not be taken to concur in the opinion of the Court of Common Pleas. In the last statute on the subject, the 8 & 9 Vict. c. 110, the legislature had rendered a suggestion or *scire facias* unnecessary, and having once enacted in distinct terms that the Court might by leave permit execution to issue, it might be that the legislature intended that the terms of this statute should lead to the same conclusion. But he guardedly made use of terms not to prejudice any future opinion on the case.

Mr. Baron Parke thought on the affidavits there was sufficient *prima facie* case of endeavours made to obtain execution from the property of the company to authorize the Court to issue a *scire facias* (k). In the *scire facias* it would be apprehended be necessary to state, as a preliminary matter, the steps taken to obtain execution against the property of the company, which was necessary to give the Court jurisdiction to issue the execution, and then the Court would exercise its jurisdiction according to their notion of its necessity, and inquire whether due pains had been taken to obtain execution from the property of the company. Undoubtedly the *scire facias* must state that Mr. Emery is a partner in the company, and that he has not paid up his shares which are due, and also the amount which has been paid on the respective shares. All these facts will be stated in the *scire facias* and are traversable matters to be decided by a jury.

Mr. Baron Alderson concurred.

Mr. Baron Platt. "I also think that the *scire facias* should go,

(i) *Devereux v. The Kilkenny and Great Southern and Western Railway Company*, Mich. T., Exch. 1850; see

a report of the case in 14 Jur. 1028. Nov. 30, 1850.

(k) *Dodgson v. Scott*, 2 Exch. 470.

and that it is the proper mode of proceeding; and that the facts in dispute between the parties ought to be tried by a jury. Without the intervention of an issue these must be tried by the Court, and we are not competent to try these facts, our duty is to decide them by the law, and the facts ought to be decided by a jury. The *scire facias* in this case is in truth a continuation of the old cause, and is founded upon the former judgment, and is a convenient and proper course to take. It seems therefore to me that this rule ought to be granted, that a *scire facias* must go."

To a *scire facias* against a shareholder of a joint-stock company to have execution on a judgment obtained against the public officer, the defendant may plead fraud and collusion between the plaintiff and the nominal defendant in the original action (l).

Pleas to scire facias against member of a joint-stock company.

So also the defendant may avail himself of that defence by motion to set aside the judgment (m).

The issuing of a *scire facias* without the leave of the Court against a shareholder of a joint-stock company, on a judgment obtained against the secretary of the company, when the Act incorporating the company provides, "that no such execution shall issue without leave first granted by the Court in which such judgment shall have been obtained upon motion in Court, and after notice of such motion," cannot be pleaded as a defence in bar of the action, but is an irregularity merely, for which an application may be made to the Court to set aside the writ (n). But the objection must be taken in due time, and it is too late to move to set aside the *scire facias* for this irregularity after the defendant has pleaded to it (o).

A shareholder of a joint-stock banking company, under the provisions of the 7 Geo. IV. c. 46, cannot plead in abatement to a declaration on *scire facias* the non-joinder of other shareholders, as by the provisions of the statute a plaintiff cannot be compelled when he has brought one party before the Court by *scire facias* to proceed against all the others (p).

To a *scire facias* against a shareholder on a judgment obtained against the public office of a joint-stock banking company, it is no answer to plead that the plaintiff had previously issued another

(l) *Philpston, Public Officer, v. The Earl of Egremont*, 6 Q. B. 587, 601, 605; *Fowler v. Rickerby*, 9 Dowl. 697.

(m) *Ibid.*; and see *Bradley and others v. Eyre*, 11 M. & W. 432; *ante*, p. 142.

(n) *Bradley and others v. Warbury*, 11 M. & W. 452; *Ricketts and others v. Bowhay*, 3 C. B. 889.

(o) *Bradley v. Urquhart*, 11 M. & W. 583.

(p) *Fowler v. Rickerby*, 9 Dowl. 693; *ante*, pp. 130, 138.

scire facias and obtained judgment thereon against another member for the time being of the same co-partnership (*q*).

Neither is it a good plea in abatement to a declaration in *scire facias* against a member of a joint-stock banking company, on a judgment obtained against the public officer of such company under the 7 Geo. IV. c. 46, that a concurrent writ of *scire facias* has been sued out on the same judgment against another member of the company (*r*).

Execution on a judgment against a public officer may issue at once without a *scire facias*, unless he pleads, or shows to the Court by affidavit, that he was not a member of the co-partnership, because the execution would be warranted by the judgment (*s*).

It is compulsory, under 7 Geo. IV. c. 46, s. 9, to sue in the name of, and to proceed against the public officer (*t*).

A defendant sued as a public officer will not be allowed to plead a number of pleas, and also to add a plea of his own personal bankruptcy, in bar of an action in which he is sued merely as the representative of the company (*u*). But the plea of bankruptcy may be pleaded, so far as the defendant is concerned (*x*). And the Court will require an affidavit of the truth of a plea, that the defendant had ceased to be a public officer before the action was commenced; as it is in effect a plea in abatement, which does not give a better writ (*y*).

As against what class of members the *scire facias* must first issue, see *ante*, p. 120, *et seq.*; and as against whom it may issue of any class, see *ante*, p. 129, *et seq.*

If a *scire facias* improperly issue against a person not secondarily liable as a member of a banking co-partnership, he may plead to it that he was not a partner when the contract was entered into (*z*); so he can plead that all available steps have not

(*q*) *Burmester, Public Officer, v. Cropton*, 3 Exch. 397.

(*r*) *Nunn v. Lomer*, 3 Exch. 471; see *contra, Esdaile, Public Officer, v. Trustwell*, 2 Exch. 312; *Esdaile and others v. Lund*, 12 M. & W. 607; S. C., 1 D. & L. 565; and see *ante*, p. 130.

(*s*) *Harwood v. Law, Public Officer*, 7 M. & W. 203; S. C., 8 Dowl. 899; *ante*, p. 117.

(*t*) *Stewart, Public Officer, v. Greaves*

and others, 10 M. & W. 711; S. C., 2 Dowl. N. S. 485; *Chapman v. Mekraim*, 1 L. M. & P. 209; *Wells v. Sutherland*, 4 Exch. 211; *ante*, p. 118.

(*u*) *Steward, Public Officer, v. Dunn, Public Officer*, 11 M. & W. 63; *ante* p. 119.

(*x*) *Wood v. Marston*, 7 Dowl. 865; *ante*, p. 120.

(*y*) *Ibid.*

(*z*) *Harvey v. Scott*, 11 Q. B. 108; *ante*, 136.

been taken against those primarily liable (a), or that his liability has ceased for three years (b).

An application may be made a second time to the Court to issue a *scire facias* against those secondarily liable on amended affidavits (c).

The omission to obtain the leave of the Court to issue a *scire facias* where necessary is an irregularity merely (d).

If the judgment be void the *scire facias* founded upon it is a nullity (e).

ON MARRIAGE OF FEME PLAINTIFF OR DEFENDANT.

See the practice generally, *ante*, p. 156, book ii. ch. iii.

On marriage of
feme
plaintiff or
defendant.

See *Mary Walker v. Gatling*, 11 M. & W. 78; S. C., 2 Dowl. N. S. 776, as to necessity of *scire facias* by husband on judgment obtained by the wife *dum sola*; where the marriage takes place before plea it should be pleaded in abatement (f). If after plea, and before the trial, it should be pleaded *puis darrein continuance*, or the wife may sue out execution, without making the husband a party, by *scire facias* (g).

But if a *feme sole* obtain judgment, and she afterwards marry before execution, there must be a *scire facias* for husband and wife in order to execute the judgment (h).

IN CASES OF BANKRUPTCY AND INSOLVENCY.

See generally, as to the practice, *ante*, p. 163, book ii. ch. iv.

In cases of
bankruptcy
or insol-
vency.

On a judgment obtained by a bankrupt or insolvent the assignees must issue a *scire facias* to make themselves parties in order to have execution (i). But proof of a judgment debt, recovered against a bankrupt under the commission, is an abandonment of the action under the 6 Geo. IV. c. 16, s. 59, and the judgment cannot be revived by *scire facias*, although no dividend has been paid (k).

(a) *Harvey v. Scott*, 11 Q. B. 108,
per Earle, J.

831; *ante*, p. 151.

(b) See *ante*, pp. 137, 138, 139;
Barker v. Buttress, 13 L. J., N. S., Eq.
58; *Stewart v. Greaves*, 10 M. & W.
720; *Nunn v. Claxton*, 3 Exch. 712.

(f) See *ante*, p. 159.

(g) *Ibid.*

(h) *Ante*, p. 160.

(c) *Dodgson v. Scott*, 2 Exch. 457;
ante, p. 137.

(i) *Hewitt and others, Assignees, v. Mantel*, 2 Wils. 372, 358; *Kretchman v. Beyer*, 1 T. R. 463; *ante*, p. 167; but see *Guiness v. Carroll*, 1 B. & Ad. 459.

(d) *Bradley and others v. Warburg and others*, 11 M. & W. 452; *Bradley v. Urquhart*, 11 M. & W. 583.

(k) *Woodward and another v. Meredith*, 2 D. & L. 135; *Harley and another v. Greenwood*, 5 B. & Al. 95; *ante*, p. 169.

(e) *Boanquet v. Graham*, 7 Jur.

A plea to a *scire facias* on a judgment obtained by a bankrupt, and brought by the original plaintiff, must state whether the judgment was recovered before or after his bankruptcy, or it will be bad on special demurrer, as it does not appear but that the bankruptcy might have been pleaded in bar to the original action (*l*).

IN CASE OF DEATH OF PLAINTIFF OR DEFENDANT.

In case of
death of
plaintiff or
defendant.

See the practice generally, *ante*, p. 174, book ii. ch. v.

On the death of a *sole* plaintiff or defendant after judgment, interlocutory or final, the legal representatives of the plaintiff or defendant deriving a benefit by, or becoming chargeable to, the judgment, must be made parties to the record by *scire facias*, in order to have execution of the judgment (*m*).

Where there are several plaintiffs or defendants, and one of them dies after judgment, the survivors become chargeable to or benefited by the execution as to personalty, and there needs no *scire facias* (*n*), as the death of a co-plaintiff may be suggested on the roll (*o*). But the execution must be taken out in the joint names of all the plaintiffs or defendants, or it will not be warranted by the judgment (*p*). But as to realty a *scire facias* is required to have execution against the survivor, and the heir and terretenants of the deceased (*q*).

See the practice where a plaintiff or defendant has died in any of the stages of a cause before final judgment, *ante*, p. 180, *et seq.*

The plaintiff must sue out two writs of *scire facias* where a defendant dies after interlocutory and before final judgment: one, before final judgment is signed to make the executors or administrators parties to it; the other, after final judgment, is signed to give them the opportunity of pleading no assets (*r*).

To a *scire facias* on an interlocutory judgment the defendant's executor or administrator can only plead a release or other matter in bar arising *puis darrein* (*s*).

(*l*) *Baylis v. Hayward*, 4 Ad. & E. 256; see *ante*, p. 170.

(*m*) See *ante*, pp. 173—189.

(*n*) *Withers v. Harris*, 7 Mod. 68; 8 & 9 Will. III. c. 11, s. 7; *Rolt v. The Mayor of Gravesend*, 7 C. B. 777; see *ante*, p. 176.

(*o*) *Newnham v. Law*, 5 T. R. 577; *ante*, p. 177.

(*p*) *Ante*, p. 177.

(*q*) *Sir Wm. Herbert's case*, 3 Rep. 14; *Wright v. Maddock*, 8 Q. B. 122; *ante*, p. 178.

(*r*) *Tomkins v. Gratton*, Bay. Rep. 266; *ante*, p. 188.

(*s*) *Smith v. Harman*, 1 Salk. 315; *ante*, p. 189.

To a *scire facias* on a judgment against an executor the defendant may plead *plene administravit* and no assets since (*t*).

The defendant cannot plead to a *scire facias* on a judgment the practice of the Court as an answer, that a rule of Court was drawn up by consent between the parties to reduce the verdict to one shilling (*u*).

An executor cannot plead in bar to a *scire facias* the pendency of a writ of error on the judgment (*x*).

A *scire facias* may be sued out by or against the executor of an executor who has proved the will of a testator (*y*). But as against the administrator of an executor or against the executor of an administrator no *scire facias* can issue, as they do not represent the testator or intestate (*z*).

ON JUDGMENT OF ASSETS QUANDO ACCIDERINT.

To a *scire facias* on a judgment *quando acciderint* the defendant may plead *plene administravit*. On judgment of assets *quando*, &c.

The judgment reaches all assets that actually exist in the hands of the executor after judgment is signed (*a*); and the plaintiff cannot reply to a plea of *plene administravit præter* that after the plea pleaded divers goods and chattels of the testator, over and above the amount of the debts having prior claim, have come to the defendant's hands.

The *scire facias* must pursue the terms of the judgment on which it is founded (*b*).

See the practice generally, book ii. chap. vi. *ante*, p. 209, *et seq.*

ON A BILL OF EXCEPTIONS TO ACKNOWLEDGE OR DENY THE SEAL OF THE JUDGE.

See the practice generally, *ante*, book ii. chap. vii. p. 206. On a bill of exceptions.

Form of the *scire facias*, see *ante*, p. 211.

If the judge deny his seal, the plaintiff in error may take issue thereupon and prove it by witnesses (*c*).

AD AUDIENDUM ERRORES.

See *ante*, book ii. chap. viii. *ante*, p. 213. Ad audiendum errores.

(*t*) *Hall v. Tapper*, 3 B. & Ad. 655;
and see *ante*, p. 195.

(*u*) *Farmer, Executrix, v. Mottram*,
1 D. & L. 781.

(*x*) *Snook v. Mattock*, 5 Ad. & E.
239; *ante*, p. 196.

(*y*) See *ante*, p. 198.

(*z*) *Ibid.*

(*a*) *Smith v. Tatham*, 2 Exch. 205;
ante, p. 202.

(*b*) See *Noell v. Nelson*, 2 Wms.
Saund. 6th ed. 219, n. 2; *Panton v.*
Hall, 2 Salk. 598.

(*c*) 2 Inst. 427; *ante*, p. 212.

TO REVIVE A JUDGMENT IN EJECTMENT.

To revive a
judgment in
ejectment.

See the practice generally, *ante*, book ii. chap. ix. p. 215.

When the judgment in ejectment is against a *feme sole*, who marries before execution, there must be a *scire facias* against the husband and wife for the costs (*d*).

AGAINST THE SHERIFF BY THE EXECUTION CREDITOR.

Against
sheriff by
execution
creditor.

See the practice generally, *ante*, book ii. chap. x. p. 218.

TO RECOVER DEBTS DUE TO OUTLAW, AND ON PARDON OF OUTLAWRY.

To recover
debts found
due to out-
law, and on
pardon of
outlawry.

See the practice generally, *ante*, book ii. chap. xi. p. 220.

To a *scire facias* on an inquisition returned by the sheriff into the Exchequer of a debt due to an outlaw, the debtor, as in other cases, may plead any defence to the action he may have (*e*).

For form of the writ to reverse outlawry on pardon or reversal by statute, see *ante*, p. 225.

TO REPEAL LETTERS PATENT.

To repeal
letters pa-
tent.

See the practice generally, *ante*, book iii. chap. ii. p. 235.

A *scire facias* lies to repeal a patent granted for an invention not invented or introduced into the kingdom by the patentee, or which is not new and useful to the public (*f*), or which is void for uncertainty, for being too general, or for false suggestions by which the Queen has been misinformed in her grant, or where the same thing has been granted to two persons (*g*).

If letters patent have been granted to two jointly a *scire facias* may issue against both, calling upon them to show cause why the letters patent should not be cancelled. And although one of the patentees may have assigned all his interest in the patent to another, yet the joinder of such patentee in the *scire facias* cannot be pleaded in abatement (*h*).

A plea in abatement for non-joinder of a co-defendant cannot be pleaded (*i*).

(*d*) *Doe d. Taggart v. Butcher*, 3 M. & S. 557; see *ante*, p. 217.

(*g*) *Ibid.*

(*e*) *Grant v. Bryant*, 6 M. & S. 347; *ante*, p. 224.

(*h*) *The Queen v. Betts and Stocken*, 19 L. J., N. S., Q. B. 531.

(*i*) *Ibid.*

(*f*) See the case cited *ante*, p. 242.

For the form of the writ, see *ante*, p. 250. The defendant must plead or demur to all the suggestions contained in the writ (*h*).

He may plead either in abatement or in bar to the writ (*i*); or he may demur to the whole or any part of the suggestions contained in the writ, alleging that the matters contained therein are insufficient in law to cause the patent to be cancelled (*k*).

But the defendant cannot plead double to any part of the writ, as the Crown is not bound by the 4th Anne, c. 16, not being named in it (*l*); and if the defendant plead several matters to the suggestions in a *scire facias*, the pleas may be set aside for irregularity (*m*).

The prosecutor may, of course, demur or join issue on any of the defendant's pleas (*n*).

The practice is so fully detailed in the chapter on this subject, *ante*, p. 235, *et seq.*, that it is unnecessary here to do more than refer to it.

TO HAVE EXECUTION OF A RECOGNIZANCE AT COMMON LAW.

See the practice generally, *ante*, book iii. chap. iii. p. 278.

When *scire facias* lies to have execution of a recognizance, see *ante*, p. 292.

To have execution on recognizances at common law.

The rules of practice, as to the *scire facias* being founded on and strictly following the record, and of pleading to the *scire facias*, are the same as on a *scire facias* on a judgment in cases where execution has not been had within the year, or where there is a new party to derive benefit by, or be chargeable to, the execution (*o*): in cases where the recognizance has a condition not on the face of it broken, the defendant may plead to the *scire facias*, setting out the recognizance, any answer that he may have (*p*), as that the condition has not been forfeited, or that it has been performed, a release of all actions, &c. (*p*).

It lies on the conusee or plaintiff to show the condition to have been broken (*q*).

(*h*) *Ante*, p. 252.

(*i*) *Ante*, p. 260.

(*k*) *Ibid.*

(*l*) *Attorney-General v. Allgood*, Parker, 1, 15; *Rex v. The Archbishop of York*, Willes, 533; *ante*, p. 260; and see *ante*, p. 35.

(*m*) Hind. on Pat. 400; *ante*, p. 261.

(*n*) *Ante*, p. 261.

(*o*) See *ante*, book i. chap. ii.; book ii. chap. i.

(*p*) See *ante*, book iii. chap. i. p. 230, and authorities there quoted; *Reg. v. The Justices of the West Riding of Yorkshire*, 7 Ad. & E. 592; *Haynes v. Hayton*, 7 B. & C. 296.

(*q*) *Fanshawe v. Morrison*, 2 Ld. Raym. 1140; *ante*, p. 294.

See form of *scire facias* on recognizance, *ante*, p. 296, and the practice thereon, *ante*, p. 298.

The statutable limitation to the binding effect of a recognizance is twenty years (*r*).

ON RECOGNIZANCE OF SPECIAL BAIL.

On recogni-
sances of
special bail.

See the practice generally, *ante*, book iii. chap. iv. p. 303.

This practice is now only resorted to where a defendant has been arrested on an affidavit by the plaintiff before a judge that the defendant is indebted to him 20*l.* or upwards, and that he has reason to believe that he is about to quit England unless he be forthwith apprehended and has been held to bail (*s*). The bail then enter into a recognizance of sufficient amount that if the debtor be condemned in the action he shall satisfy the costs and condemnation money or render himself to prison, or they will be answerable (*t*).

If this condition be broken a *scire facias* may issue upon the recognizance founded upon it (*u*), to which the defendants may plead payment of the debt and costs (*x*), death of the principal before a *ca. sa.* issued against him (*y*); that the principal has obtained his certificate as a bankrupt (*s*), or has obtained his discharge as an insolvent (*a*), before the bail were fixed; that they have rendered the principal (*b*); variance between the declaration and the affidavit to hold to bail (*c*); that time has been given to the principal (*d*); that the defendant's position has been altered since the bail entered into their recognizance (*e*), &c.

See the practice on the *scire facias*, *ante*, pp. 313, 316, *et seq.* Form of the *scire facias*, *ante*, p. 316.

ON RECOGNIZANCE OF BAIL IN ERROR.

On recogni-
sance of
bail in
error.

See the practice generally, *ante*, book iii. chap. v. p. 320.

Form of recognizance entered into by the bail, *ante*, p. 323.

The *scire facias*, as in other cases, must be founded on the record of the recognizance, and must strictly pursue its terms (*f*).

(*r*) See *ante*, p. 14; and 3 & 4 Will.
IV. c. 42, s. 3.

(*s*) See *ante*, p. 305; 1 & 2 Vict. c.
110, s. 3.

(*t*) See *ante*, p. 307; 1 Chitty's Arch.
Pr. 8th ed. 734.

(*u*) *Ante*, p. 307.

(*x*) *Ante*, p. 307, 308, and cases cited.

(*y*) *Ante*, p. 308, and cases cited.

(*z*) *Ibid.*

(*a*) *Ante*, p. 309.

(*b*) *Ibid.*, and cases cited.

(*c*) *Ante*, p. 310.

(*d*) *Ante*, p. 311.

(*e*) *Ante*, p. 312.

(*f*) *Ante*, p. 20; 2 Chitty's Arch.
Pr. 8th ed. 1025; *ante*, p. 317.

The bail may plead in bar a release made to the principal and bail of all debts, judgments, and executions betwixt the first judgment and before its affirmance (*g*).

AGAINST PLEDGES IN REPLEVIN.

See *ante*, book iii. chap. vi. p. 326.

Against
pledges in
replevin.

ON BOND TO THE CROWN.

See the practice generally, *ante*, book iii. chap. vii. p. 329.

On bond to
the crown.

If it be doubtful whether the bond be forfeited and the debtor be solvent, or if the suit be against sureties, then the course is to proceed by *scire facias* to have execution of it (*k*).

The *scire facias* must recite the bond on which it is founded, which, by the stat. 33 Hen. VIII. c. 89, is made a record (*i*).

See the practice on, *ante*, pp. 334, 335.

The defendant may plead to the *scire facias* in abatement, or in bar, any defence that he may have; or may demur to it as insufficient in law (*k*).

In order to plead several matters the consent of the Attorney-General must be obtained (*m*).

In pleading, the bond, though put on the footing of a statute-staple by statute, is not treated as a record, but as a bond; if therefore it be denied the plea is *non est factum* (*n*); and performance of the condition is pleaded to the *scire facias* as on any other bond (*o*).

Defences given by statutes in which the Crown is not named cannot be pleaded; thus, a set-off or bankruptcy cannot be pleaded (*p*).

The defendant must join in demurrer in six days (*q*).

If the Attorney-General will not proceed, nor enter a *nolle prosequi*, the Court will order judgment to be entered for the defendant (*r*).

(*g*) *Harrison v. Hucksley and others*,

ante, p. 337.

Cro. Jac. 401; *ante*, p. 325.

(*n*) *Rex v. Broadnax*, Tremain's Pl. of the Crown, 608.

(*k*) Bunb. 58; *ante*, p. 333, 334; 3 Price, 288, 292.

(*o*) See *ante*, p. 337.

(*i*) See form of, *ante*, p. 334; *Reg. v. Chapman*, 3 Anst. 811; *ante*, p. 337.

(*p*) *Rex v. Ellis*, 1 Price's Rep. 23; West, 199; *ante*, p. 337.

(*k*) See *ante*, p. 336.

(*q*) See *ante*, p. 337.

(*m*) *Rex v. Caldwell*, Farr. 57; *Rex v. Sir C. Peck and others*, Hard. 189;

(*r*) *Rex v. Musters*, Parker, 50; West, 213; *ante*, p. 337.

The Crown is entitled to reply double; and after demurrer may waive the demurrer and take issue, or waive the issue and demur in the same term (*s*).

See the practice generally, *ante*, p. 338.

ON INQUESTS OF OFFICE TO RECOVER SIMPLE-CONTRACT
DEBTS DUE TO THE CROWN.

On inquests
of office.

See generally, as to the practice, *ante*, book iii. chap. viii. p. 340.

The *scire facias* is founded on the record of the inquisition returned into Chancery or into the Exchequer (*t*).

As there can be no averment in pleading against the validity of a record, though there may be against its operation (*u*), the defendant, it seems, should plead *non indebitatus*, under which any evidence in avoidance or discharge of the debt since the inquisition may be given (*x*). The plea of *nul tiel record* would put in issue merely the record, not the debt (*y*).

No pleas given by statutes in which the Crown is not named can be pleaded, as set-off, bankruptcy, &c. (*z*).

Under the statute 33 Hen. VIII. c. 39, s. 79, the defendant may plead, or show in bar or discharge of his debt, any "good, perfect, and sufficient cause and matter in law, reason, or good conscience;" and under this statute matter in equity may be pleaded (*a*).

See the general rules of practice, as to proceedings on an inquisition, *ante*, p. 345.

(*s*) Man. Exch. 141, 199; *The King v. The Bishop of Worcester*, Vaugh. 65; see *ante*, p. 338.

(*t*) 2 Tidd's Prac. 8th ed. 1092; see *ante*, pp. 342, 343; West, 194; *Dean v. Reginam*, 15 M. & W. 475.

(*u*) 1 Chit. Pl. 6th ed. 485.

(*x*) *Ibid.*; and see West on Extent, 199, 200; *ante*, p. 344.

(*y*) West, 200.

(*z*) See *ante*, p. 344.

(*a*) West, 201, 202; *Sir Thomas Cecil's case*, 7 Rep. 20; and see *ante*, p. 344.

CHAPTER II.

AMENDMENT OF PROCEEDINGS ON SCIRE FACIAS.

The Practice as to Amendments generally at Common Law, p. 373.

Proceedings amendable at Common Law whilst in Paper, p. 373.

And during the Term when the Record was made up, p. 374.

The Alterations effected by Sta-

tutes, p. 374.

Applicable to Proceedings on Scire Facias, p. 375.

Scire Facias formerly not amendable, p. 375.

Now not amendable after Plea of Nul tiel record, p. 376.

Name of nominal Plaintiff may be amended, p. 377.

IN all actions it was anciently the practice not to suffer any amendments to be made after the matter was on record (a), the judges not being allowed to erase their records or to amend them at common law. Of the former strictness of this rule a singular instance is given in Coke's 4th Institute (b). But whilst the pleadings were *ore tenus*, amendments were allowed in them, if then perceived (c); and when pleadings in paper were introduced instead of the old way of pleading, it was thought but reasonable, after a plea to issue, or demurrer joined, that, upon payment of

The practice as to amendments generally at common law.

Proceedings amendable at common law whilst in paper,

(a) *Rex v. Ellames*, Rep. temp. Hardw. 42.

(b) Page 255.—“Radulphus de Ingham, Chief Justice of England, (a very poor man being fined before him at 13s. 4d.) in another term, moved with pity, caused the record to be rased and made 6s. 8d.; for which he (for his fine) made the clock (to be heard into Westminster Hall) and the clockhouse in Westminster, which cost him 800 marks and continueth unto this day; which sum was entered into the roll. And almost in the like case, in the reign of Queen Elizabeth, Sir Robert Catlyn, Chief Justice of England, would have had Justice Southcote

(one of his companions, Justice of the King's Bench) to have altered a record, which the justice denied to doe, and said openly in Court, that he meant not to build a clockhouse.”

(c) 10 Mod. 88, *Rush v. Seymour*.

“Anciently, all pleas were *ore tenus* at the bar; and then, if any error was spied in them, it was presently amended. Since that custom is changed, the motion to amend whilst the proceedings were in paper succeeded in the room, and it is a motion that the Court cannot refuse, except the party desiring it refuse to pay costs, or the amendment desired should amount to a new plea.” And see *Garner v. Anderson*,

costs, the parties should have liberty to amend their pleading (*d*). Whilst the proceedings were in *paper* they were considered as only *in fieri*, and therefore subject to the control of the Courts (*e*). When, however, the record was once made up, by the common law, no amendment could be permitted, except during the term when the judicial act was recorded, the record during the term being considered to remain "in the breast of the judges of the Court and in their remembrance, and therefore the roll was alterable during that term as the judges should direct" (*f*).

and during the term when the record was made up.

The alterations effected by statutes,

But by several statutes, and by a relaxation on the part of the Courts of their former strictness with regard to amendments (*g*), "in furtherance of justice, and in order to obtain the right between the parties" (*h*), the proceedings on paper may now be amended in the discretion of the Court, so far as such amendments tend to the furtherance of justice, in all cases before verdict (*i*), provided that a new cause of action be not introduced (*k*). Thus, by the statutes 9 Geo. IV. c. 15, s. 1, and 3 & 4 Will. IV. c. 42, s. 23, variances between the record and the proof, *during the trial*, in any matter "in writing or in print produced in evidence," or in "any contract, custom, prescription, name, or other matter" not in writing or print, where "not material to the merits of the case," and by which the opposite party cannot be prejudiced in the conduct of his action or defence, may be amended. And, by the statutes 16 & 17 Car. II. c. 8, and 5 Anne, c. 16, s. 2, "omissions, variances, defects, and all other matters of a like nature not being against the right of the matter of the suit, nor whereby the issue or trial is altered," are aided and cured after verdict; and, by the statutes 14 Edw. III. st. 1, c. 6, the 8 Hen. VI. c. 12, and the 8 Hen. VI. c. 15, the record of the judgment is amendable in all that which seemeth

1 Stra. 11.—By the Court, "The foundation of amendments by the Court whilst the proceedings remained in paper, before they be recorded, is that these papers, delivered to and fro, supply the declaring and pleading *ore tenus* at the bar, and may be amended as easily as if spoke at the bar."

(*d*) *Anon.* 2 Salk. 520.

(*e*) 3 Bla. Com. 407.

(*f*) Co. Inst. 260 a; *Anon.* 3 Salk. 32.—"During the term the Court might amend any mistake in the roll

at common law, for the roll is only the remembrance of the Court during the term. But at common law, after the term, the Court could not amend any fault in the roll, for then the record is not in the breast of the Court, but in the roll itself."

(*g*) *Alder v. Chip*, 2 Burr. 755.

(*h*) *Rex v. Ellames*, Rep. temp. Hardw. 42; 7 T. R. 703.

(*i*) *Rex v. The Mayor of Grampound*, 7 T. R. 703; *Jones v. Edwards*, 3 M. & W. 220.

(*k*) *Morris v. Evans*, 1 Dowl. 657.

so the judges in their discretion to be "the misprision of a clerk, by mistaking in writing one syllable or one letter too much or too little." There must, however, be something to amend by (*l*), and the power is confined to the misprisings of a clerk or officer of the Court, and does not extend to the amendment of bad pleas (*m*).

It now remains for us to examine how far the decisions and practice on these statutes are applicable to proceedings on *scire facias*. applicable to proceedings on *scire facias*.

It has been held, that whenever an original writ is amendable there a *scire facias* is so too (*n*).

It was formerly held, that a *scire facias* was not amendable; and therefore, if it were defective in the teste or return, or varied from the record, &c., the plaintiff must move to quash it (*o*). But there are many cases in the books in which a writ of *scire facias* *Scire facias* formerly not amendable.

(*l*) *Wentworth v. Stafford*, 5 Mod. Comb. 393; *Salter v. Slade*, 1 Ad. & B. 614; *Cheese v. Scales*, per Parke, B., 2 Dowl. N. S. 443.

(*m*) *Green v. Millar*, 2 B. & Ad. 781.

(*n*) *Buxom v. Hoskins*, 6 Mod. 264; *Reg. v. Aires*, 10 Mod. 259, n. (b); *Res v. Eyre*, 1 Stra. 43; Bac. Abr. tit. *Scire Facias*, D; and see 2 Chit. Arch. Prac. 8th ed. 1033.

(*o*) 2 Tidd. 8th ed. 1176; 9th ed. 1123; Bac. Abr. tit. *Scire Facias*, D; *Vavasor v. Baile*, 1 Salk. 52. "*Scire facias* on a judgment, and, by mistake in the *scire facias*, the plaintiff's name was put for the defendant's, *ecil Radulphus* for *Jacobus*; and they moved to amend, it being the fault of the clerk: denied; for the writ does not appear to us to be wrong, and there may be such a judgment for ought we know." So a joint judgment against bail on several *scire facias* was held not amendable. *Villars v. Parry & Moore*, 1 Ld. Raym. 182, 547. So, in *Bucksome v. Hoskin*, 2 Ld. Raym. 1057, where there was a variance in the *scire facias* from the judgment, the judgment being of two messuages, and the *scire facias* reciting it to be but

of one. On which *nul tiel record* was pleaded. It was contended that the *scire facias* might be amended, because it was but *vitium clerici* in varying from the record. But it was held that there might be such a judgment as was recited in the *scire facias*, and for this reason they refused to amend it. Afterwards a further application was made to the Court to amend the writ, but the Court refused to amend, because the plaintiff in error had taken advantage of this mistake in the writ, by pleading *nul tiel record*; and because this writ was a good writ upon the face of it, and all that was amiss in it was, that it did not fit the defendant's case. Holt, Chief Justice, said, "that if the defendant had appeared, and taken no advantage of this variance, the Court might have amended it. But here *nul tiel record* is pleaded, and can we amend when they have taken advantage of it?" He said also, that "this is not such a mistake as makes the writ erroneous, but is a mistake in a matter of fact." And see *Hillier v. Frost*, 1 Stra. 401; *Baynes v. Forrest*, 2 Stra. 892; *Grey v. Jefferson*, 2 Stra. 1165; *Davis v. Dunn*, 1 Dowl. N. S. 317.

has been amended by the Courts; not only where it was bad on the face of it, by the mistake of the clerk; but also for a variance when the defendant had not taken advantage of it by pleading *nul tiel record* (p). In cases where the variance has arisen from a want of ordinary care, and there has been gross negligence, the Court will refuse to allow an amendment (q), the object of the statute 9 Geo. IV. c. 15, being to prevent a failure of justice from accidental errors, and not from blunders which no man could make who would but use his eyesight (r). And the power of amendment would seem to be discretionary with the judge at Nisi Prius (s). Where the variance is not material to the merits (t), and there is something to amend by (u), even after writ of error brought on a judgment in an action of covenant, because of inconsistency between the judgment and the breaches assigned, the *postea* may be amended by the judge's notes, and the judgment may be amended by the *postea* (x).

Scire facias
not amend-
able after
plea of *nul*
tiel record.

The declaration in *scire facias* was in one case held to be amendable, even after a plea of *nul tiel record*, to the record on which it was founded (y). But a more recent decision in the same Court has decided that an amendment of the declaration, so far as the issue raised by the plea of *nul tiel record* is concerned, would be material to the merits, and that the Court has no power to make it under the 3 & 4 Will. IV. c. 42. s. 23 (z).

(p) 2 Tidd, 8th ed. 1176.

(q) *Whitehead v. Scott*, 2 M. & M. 137.

(r) *Jelf v. Oriell*, 4 C. & P. 22; *Webb v. Hill*, 1 M. & M. 255; *Atkinson v. Raleigh*, 3 Q. B. 86.

(s) *Thorpe v. Hook*, 1 Dowl. 501; *Cheese v. Scales*, 2 Dowl. N. S. 442; *Parke v. Edge*, 1 Cr. & Mee. 433; *Doe d. Poole v. Ebrington*, 1 Ad. & E. 750; but see now 3 & 4 Will. IV. c. 42, s. 23; *Hanbury v. Ella*, 1 Ad. & E. 61; *Davis v. Dunn*, 1 Dowl. N. S. 318; *Sarby v. Wilkin*, 1 D. & L. 281; *Bluet v. Middleton*, 1 D. & L. 376; *Margett v. Parker*, 1 D. & L. 582; *Doe d. Knowles v. Roe*, 1 D. & L. 590; *Brashier v. Jackson*, 6 M. & W. 558; *Whitwell v. Sheer*, 8 Ad. & E. 301; and, as against bail, see 2 Tidd, 8th ed. 1176; 2 Wms. Saund. 72 y, (u); 1 Tidd, 8th ed. 280; Barnes, 59;

Fahwood v. Annis, 3 B. & P. 321; *Stevenson v. Grant*, 2 N. R. 103.

(t) *Anon.* 3 Mod. 113; *Sebons v. Kirkman*, 6 Dowl. 98; *Break v. Finch*, 6 Dowl. 313; *Wright v. Horton*, 1 Stark. N. P. 400.

(u) *Green v. Rennet*, 1 T. R. 782; *Tomkinson v. Blacksmith*, 7 T. R. 132; *Brasswell v. Jeco*, 9 East, 316.

(x) *Rowers v. Nison*, 12 Q. B. 546.

(y) *Klos, Assignee of M^r Dowdell v. Dodd*, 4 Dowl. 67.

(z) *Davis v. Dunn*, 1 Dowl. N. S. 317; but see *Phillips v. Smith*, 3 Dowl. N. S. 688, in which it was held that the judgment alone was in issue on such a plea; and see *Klos v. Dodd*, 4 Dowl. 67; and see the late case of *Cooper v. Pennefather*, 7 C. B. 739.

The name of a nominal plaintiff on the record may be amended ; Name of nominal plaintiff may be amended.
 as where, in an action by the public officer of a joint-stock banking company, the nominal plaintiff was removed from his office ; and the Court has allowed this amendment *nunc pro tunc* after judgment (a).

So where a party had become bankrupt, and his assignees were proceeding by *scire facias* against a defendant, on a judgment recovered by the bankrupt, the Court permitted the record to be amended after issue joined, by introducing the name of the official assignee as one of the plaintiffs (b).

In cases where it is probable that leave to amend a writ of *scire facias* will not be granted by the Court in the exercise of its discretion, if *nul tiel record* be pleaded, the plaintiff should move to quash the writ (c), which he will be allowed to do on payment of costs after appearance (d).

After verdict on the *scire facias* all defaults in form are cured by the Statutes of Jeofails (e).

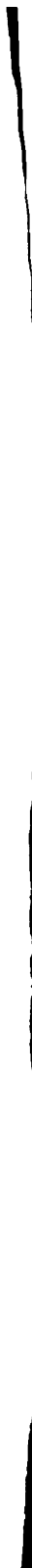
(a) *Webb, Public Officer, v. Taylor*, 1 D. & L. 676.

(b) *Holland and another, Assignees of Hayward, v. Phillips*, 10 Ad. & E. 149 ; and see *Baker v. Weaver*, 1 Cr. & M. 112.

(c) *Barnes v. Forrest*, 2 Stra. 893.

(d) *Oliverson v. Latour*, 7 Dowl. 605 ; R. H. 2 Will. IV. r. 78 ; 2 Chit. Arch. Prac. 8th ed. 1032.

(e) 18 Eliz. c. 14, s. 1 ; 21 Jac. I. c. 13, s. 2 ; 16 & 17 Car. II. c. 8 ; see *The Mayor of London v. Cole*, 7 T. R. 587, in which Twisden, J., terms the latter stat. "The Omnipotent Act ;" 5 Geo. I. c. 13 ; and see 4 & 5 Anne, c. 16, s. 2, which aids defects in the record after judgment by confession or default.



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TO REVIVE A JUDGMENT AFTER A YEAR AND A DAY.

BOOK I. CHAPTER III.

See Tidd's Forms, 6th ed. 534, *et seq.*

The like in Exchequer in debt on an annuity bond after a former *scire facias*; Tidd's Forms, 6th ed. 536.

And see form, 3 Chitty's Pleading, 7th ed. by Greening, 557.

Writ of *scire facias* for further breaches of condition of bond on which judgment has been obtained, 3 Chitty's Pleading, 7th ed. by Greening, 558.

Declaration thereon, *ibid.* 559.

Writ of inquiry thereon, defendant having suffered judgment by default, *ibid.* 560.

And see forms, Chitty's Arch. Forms, 6th ed. 342, 343, 344, and 345. (*Ante*, p. 31.)

(See *ante*, p. 47.)

Scire Facias to levy Residue of Debt after an Eviction under an Elegit.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriff of _____ greeting: Whereas A. B. lately in our Court before us at Westminster [*or, in the Exchequer, "before the Barons of our Exchequer at Westminster;" or, in Common Pleas, "before the Right Hon. Sir John Jervis, Knight, and his companions, then our justices of the bench at Westminster"*] by the judgment of the same Court recovered against C. D. £ _____, which in our said Court before us were adjudged [*or, in the Exchequer or Common Pleas, "which in the same Court were adjudged"*] to the said A. B. for his damages, which he had sustained, as well on occasion of the not performing of certain promises

and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended [or, *in debt*, "recovered against C. D. a certain debt of £ , and also £ , which in our said Court before us were adjudged to the said A. B. for his damages which he had sustained as well by reason of the detention of the said debt as for his costs and charges by him about his suit in that behalf expended"] whereof the said C. D. was convicted as appears to us of record; [or, *in Exchequer*, "whereof the said C. D. was convicted, as by inspecting the rolls of our said Exchequer appears to us:" in *Common Pleas*, "whereof the said C. D. was convicted as by the record and proceedings thereof remaining in our said Court before our justices at Westminster aforesaid manifestly appears"], and afterwards the said A. B. came into our said Court before us [in *Exchequer*, "before the Barons of our Exchequer," in *Common Pleas*, "before our said justices"], and according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick [or, "in the bailiwick of the sheriff of , "as the case may be], except his oxen and beasts of the plough; and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the day of , in the year of our Lord (a), on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns according to the form of the said statutes until the damages [or, "debt and damages"] aforesaid, together with interest upon the said sum of £ , at the rate of four pounds per centum per annum from the day of , in the year of our Lord , should be levied. And whereas, for having execution of the judgment aforesaid, we lately by our writ commanded ["you" or] our sheriff of that without delay he should cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in his bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including land and hereditaments of copyhold or customary tenure in his bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of , or at any time afterwards, or over which the said C. D. on the said day of , or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until

(a) The day on which judgment was entered up.

the damages aforesaid, together with interest as aforesaid, should be levied; and that in what manner he should have executed this our writ he should make appear to us at Westminster [in *Exchequer*, "should make appear to the Barons of our said Exchequer at Westminster;" or, in *Common Pleas*, "should make appear to our justices at Westminster"] immediately after the execution thereof, under his seal and the seals of those by whose oath he should make the said extent and appraisement, and that he should then have there the said writ. And our said sheriff of _____ thereupon returned to us that by virtue of the said writ to him directed, he had caused to be made by a reasonable price and extent of the goods and chattels of the said A. B., excepting his oxen and beasts of the plough, the sum of £ _____ parcel of the damages [or, "debt and damages"] and interest aforesaid; and that he had caused to be delivered to the said A. B. all the lands and tenements, to wit [described *them, or the nature of the property, as the case may be*] of the said C. D. in his bailiwick, to hold the said lands and tenements, according to the nature and tenure thereof, to him and to his assigns, until the damages [or, "debt and damages"] aforesaid, together with interest as aforesaid, should be levied. And although possession of the said lands and tenements hath been by reasonable extent to the said A. B. delivered in execution for the satisfaction of the residue of his said damages [or, "debt and damages"] according to the laws of the realm, nevertheless the said A. B. hath been lawfully evicted from the possession of the said lands and tenements [*state the nature of the eviction according to the facts*] before he hath been fully satisfied and paid off the residue of his said damages [or "debt and damages"] without any manner of fraud, deceit, covin, collusion, or other default in the said A. B., as by the information of the said A. B. we are given to understand. And execution on the said judgment, obtained by the said A. B., for £ _____, being the residue of the damages [or, "debt and damages"], and interest aforesaid still remains to be made; wherefore the said A. B. hath humbly besought us to provide him a proper remedy in this behalf. And we, being willing that what is just in this behalf should be done, command you that by honest and lawful men of your bailiwick you make known to the said C. D. that he be before us at Westminster [in *Exchequer*, "that he be before the Barons of our said Exchequer at Westminster;" in *Common Pleas*, "that he be before our justices at Westminster"] on the _____ day of _____ now next ensuing, to show if he has or knows of anything to say for himself why a new writ or writs on the said record of judgment, of the like nature and effect as the said former writ of execution was, should not be made for the levying of the residue of all such damages [or, "debt and damages,"] aforesaid, together with interest thereon, at the rate of four pounds *per centum per annum*, from the _____ day of _____, in the year of our Lord _____, on which day the judgment aforesaid was entered up, according to the force, form, and effect of the said recovery, if it shall seem expedient for him; and further to do and receive what our said Court before us [in *Exchequer*, "before our said barons," in *Common Pleas*, "before our said justices"] shall then and there consider of the said C. D. in this behalf; and have there then the names of those by whom you shall so make known to him, and this writ. Witness, John Lord Campbell, at Westminster, the _____ day of _____, in the _____ year

of our reign. [*In Common Pleas*, "Witness, Sir John Jervis, Knight, at Westminster," &c.; *the same in the Exchequer*, inserting the name of the Chief Baron] (b).

BOOK I. CHAPTER V.

FOR FORMS OF SCIRE FACIAS AD REHABENDAM TERRAM,

See precedent to have delivery of lands extended by *elegit* in debt; *Ras-tell's Entries*, 164 b.

Where plaintiff has levied part of the money, and defendant is prepared to pay part of the residue, and bring the money into Court which the plaintiff received; *Veteres Intrationes*, 138; *Moile's Entries*, 101.

Against tenant by *elegit* to account; *Brown's Methodus Novissima*, 371.

See form in *Underhill v. Devereux*, 2 V. Wms. Saund. 68.

And form of *elegit*, 4 M. & W. 546. (*Ante*, p. 58.)

BOOK I. CHAPTER VI.

FOR FORMS OF SCIRE FACIAS QUARE RESTITUTIONEM NON ON A
JUDGMENT REVERSED,

See precedent, 2 Lilly's Mod. Entries, 641; *Ibid.* 650.

And see precedents in Tidd's Forms, 6th ed. 638 and 639. (*Ante*, p. 64.)

BOOK II. CHAPTER II.

FORMS AND REFERENCES TO FORMS AGAINST MEMBERS OF JOINT-STOCK
BANKING COMPANIES.

(See *ante*, p. 106.)

Declaration in Scire Facias, in Common Pleas, against Members of a Joint-stock Banking Company, for "the time being" in C. P. (c).

In the

The

day of

A. D.

to wit. The sheriffs of London were commanded, whereas S. F., J. G., and M. G., lately in the court of our lady the Queen Victoria, of the bench

(b) The writ is returnable in 40 days. See the Stat. 32 Hen. VIII. c. 5, *ante*, ch. iv. p. 53.

(c) 3 Chitty's Plead. 7th ed. p. 563; and see form, *Fowler and others v. Rickerby*, 9 Dowl. 682. The declaration should be entitled of a day certain; *Collins v. Beaumont*, 5 Dowl. 700; and see *Bradley v. Eyre*, 11 M. & W. 432; and *Bradley v. Urquhart*, *ib.* 456, as to the pleadings. The form in Chitty's Arch. Prac., Forms, p. 483, has been held bad, and the Court will quash such a writ on motion, where it describes the defendant as "a member for the time being," and also "at the time of the judgment recovered," because in the former case the plaintiff without leave of the Court may issue

his *scire facias* against a member, whilst in the latter the leave of the Court is necessary before issuing the writ. See *The Governor and Company of the Bank of Scotland v. Fenwick*, 1 Exch. 792; 5 Dowl. & L. 377, S. C. And a declaration, which stated that "the defendant at the time of the judgment recovered was, and from thence hitherto has been, and still is, a member of the co-partnership," was held bad, on special demurrer, in *Edaile, Public Officer, v. Trustwell*, 1 Exch. 371. And see the form in *Nunn v. Claxton*, 3 Exch. 712, in which the averment, respecting the defendant proceeded against, was "that T. C. now is a member of the said copartnership," was specially demurred to and held good.

at Westminster, before Sir John Jervis, knight, chief justice, and his companions the justices of our said lady the Queen of the bench, under and by virtue of the statute in such case made and provided by the judgment of the same Court, recovered against W. M., (one of the public registered officers for the time being, of certain persons united in co-partnership for the purpose of carrying on, and carrying on the trade and business of bankers in England, under the name of the _____, under and by virtue, and according to the form and effect, of an Act of Parliament made and passed in the seventh year of the reign of his late Majesty King George the Fourth, for, amongst other things, the better regulating co-partnerships of certain bankers in England, and which said W. M. had been duly nominated and appointed and registered as such public officer, and was then sued for and on behalf of the said company, according to the form and effect of the said Act of Parliament,) £ _____ for their damages which they had sustained, as well on occasion of the not performing certain promises then lately made by the said company to the said S. F., &c., as for their costs and charges by them about their suit in that behalf expended, whereof the said W. M. was convicted, as by the record and proceedings thereof, then still remaining in the same Court, manifestly appeared; and then on behalf of the said S. F., &c., in the same Court, our said lady the Queen was informed, that although judgment was thereupon given, yet execution of the damages aforesaid still remained to be made to them. And our said lady the Queen was also informed, on behalf of the said S. F., &c., that T. R., &c., [fifteen defendants] now are members of the said co-partnership (*d*); wherefore the said S. F., &c., had humbly besought our said lady the Queen to provide them a proper remedy in that behalf and our said lady the Queen, being willing that what was just in that behalf should be done, commanded the said sheriffs, that by honest and lawful men of their bailiwick, they should make known to the said Thomas Rickerby, &c., that they should be before the said justices of our said lady the Queen at Westminster, on the _____ of _____, 18____, to show if they had or knew, or any or either of them had or knew, of anything to say for themselves or himself, why the said Sarah Fowler, &c., ought not to have execution against the said Thomas Rickerby, &c., of the damages aforesaid, according to the force, form and effect of the said recovery, and of the statute in such case made and provided, if it should seem expedient for them so to do; and further, to do and receive what our said justices did then and there consider of them in that behalf; and the said sheriff should have there the names of those by whom they should make known to them, and that writ, at which day come here the said Sarah Fowler, &c., by Thomas Hornby, their attorney, and offer themselves on the fourth day against the said Thomas Rickerby, &c., and the sheriffs, to wit, _____ and _____ sheriffs of London, aforesaid, at that day returned, that the said Thomas Rickerby, &c., had

(*d*) See *Esdaile v. Trustwell*, 1 Exch. 371; *Nunn v. Claxton*, 3 Exch. 712; and note, *ante*. If the *scire facias* be against the class of shareholders secondarily liable, they must be accurately described according to their class. (See *ante*, bk. ii. ch. ii.) And a *scire facias* against the members of

such a company at the time of the contract ought to state the prior execution against the members at the time of the execution, which is a condition precedent and is necessary to warrant the *scire facias* against a member at the time of the contract; *Bank of England v. Johnson*, 3 Exch. Rep. 604.

not, nor had any of them, anything in their bailiwick, whereby they could make known to them or any of them as by the said writ they were commanded, nor were they, the said Thomas Rickerby, &c., or any of them found in the same. And the said Thomas Rickerby, &c., at that day, being solemnly demanded, the said Thomas Rickerby, &c., by their attorney, come; and the said Sarah Fowler, &c., pray that execution against the said Thomas Rickerby, &c., [reciting the names of those twelve out of the fifteen defendants who had appeared,] may be adjudged to them of the damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided.

See also the form of a declaration in *scire facias* on a judgment against a public officer of a banking co-partnership, under 7 Geo. IV. c. 46, against a member of the co-partnership, to have execution on the judgment; *Nunn v. Claxton*, 3 Exch. Rep. 712.

ANOTHER FORM.

SCIRE FACIAS AGAINST MEMBERS OF JOINT-STOCK COMPANIES.

Scire Facias in Common Pleas by the Public Officer of a Banking Company against a Member of another Banking Company, to have execution against him under the 7 Geo. IV. c. 46, s. 18, he being a Member at the time of issuing the writ of Scire Facias.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriffs of London, greeting: Whereas R. B., one of the public registered officers of certain persons united in co-partnership for the purpose of carrying on and carrying on the trade and business of bankers in England, according to the statute made and passed in the seventh year of the reign of his late Majesty King George the Fourth, for the better regulating co-partnerships of certain bankers in England, and called the National Provincial Bank of England, as such officer lately, on the day of , A. D. , in our Court before Sir John Jervis, knight, and his companions, her Majesty's justices of the Bench at Westminster, by the judgment of the same Court, recovered against R. L. as and being one of the public registered officers for the time being of certain persons united in co-partnership by and under the name and style of, and called, "The Imperial Bank of England," for the purpose of carrying on and carrying on the business of bankers in England, under the provisions of the said statute, and which said R. L. had been duly nominated and appointed one of the public officers of the said last-mentioned co-partnership, to be sued and was then sued as the nominal defendant, for and on behalf of the said last-mentioned co-partnership, according to the form and effect of the said statute, £ which in our same Court were adjudged to the said R. B., as such officer as aforesaid, for the damages which the said co-partnership called the N. P. B. E. had sustained, as well on occasion of the not performing of certain promises before then made to them by the said co-partnership called the I. B. E., as for his costs and charges by him about his suit in that behalf expended, whereof the said R. L., as such public officer as aforesaid, is convicted, as appears to us of record: and whereas, by and according to the provisions

and form and effect of the said statute, execution upon any judgment in any action obtained against any public officer for the time being of any such co-partnership, as in the said Act mentioned, carrying on the business of banking under the provisions of the said Act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such co-partnerships: and whereas S. H. now (e) is a member of the said co-partnership called the I. B. E., then and still being such a co-partnership as in the said statute mentioned, and then and still carrying on the business of banking under the provisions of the said statute, as by the information of the said R. B. in our said Court before our justices here, we have been given to understand, and now on the behalf of the said R. B. as such officer as aforesaid, in our said Court before our justices here we have been informed, that although judgment be thereupon given, yet execution of the damages aforesaid still remains to be made to him as such officer as aforesaid: Wherefore the said R. B. as such officer as aforesaid for and on behalf of the said co-partnership, called the N. P. B. E., hath humbly besought us to provide him a proper remedy in this behalf; and we, being willing that what is just and right in this behalf should be done, command you that by honest and lawful men of your bailiwick you make known to the said S. H., that he be before our justices at Westminster on the day of next, [or "instant"] to show if he have or knows of anything to say for himself why the said R. B., as such officer as aforesaid, should not have execution against him for the damages aforesaid, together with interest thereon at the rate of four pounds *per centum per annum*, from the said day of , A. D. , on which day the judgment aforesaid was entered up, according to the force, form, and effect of the said recovery, and of the said statute, if it shall seem expedient for him so to do; and further, to do and receive what our said Court before our justices of the bench here shall then consider of him in this behalf: and have you there the names of those by whom you shall so make known to him and this writ. Witness, Sir John Jervis, knight, at Westminster, the day of , A. D.

ANOTHER FORM OF WRIT OF SCIRE FACIAS, AGAINST A MEMBER, FOR THE TIME BEING, OF A BANKING CO-PARTNERSHIP IN THE EXCHEQUER.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to the sheriffs of London, greeting: Whereas J. E., H. B., F. B., C. G., and H. H., lately in our Court before the barons of our Exchequer at Westminster, by the judgment of the said Court, recovered against Joseph Wood, one of the public officers for the time being, of and for certain persons united in co-partnership for the purpose of and carrying on the trade and business of bankers in England, according to the statute made and passed in the seventh year of his late Majesty King George the Fourth, intituled "An Act for the better regulating of Co-partnerships of certain Bankers in England, and for amending so much of an Act of the Thirty-ninth and Fortieth Years of the Reign of his late Majesty King George the

(e) See *The Governor and Company of S. C.*; *Esdaile v. Trustwell*, 1 Exch. 371; *the Bank of Scotland v. Fenwick*, 17 L. J., *Nunn v. Claxton*, 3 Exch. 712; *and*, book N. S., Ex. 92; 1 Exch. 792; 5 D. & L. 377, ii. ch. ii. p. 141.

Third, intituled 'An Act for establishing an Agreement with the Governor and Company of the Bank of England, for advancing the Sum of Three Millions towards the Supply for the Service of the Year One thousand eight hundred, as relates to the same;' and called the "Yorkshire Agricultural and Commercial Banking Company;" and which said Joseph Wood, at the time of his appointment, was a member of the said co-partnership, and resident in England, and hath been duly nominated and appointed, and now is one of the public officers for the time being of the said co-partnership, according to the force, effect, and provisions of the said Act of Parliament; as well a certain debt of thousand pounds, for money borrowed by the said Company of the said J. E., H. B., F. B., C. G., and H. H., as £ , which in our said Court were awarded to the said J. E., H. B., F. B., C. G., and H. H. for their damages which they sustained, as well by the reason of the detaining the said debt as for their costs and charges by them about their suit in that behalf expended, whereof the said Joseph Wood (as such public officer as aforesaid) is convicted, as by the record and proceedings thereof still remaining in our said Court manifestly appears. And whereas, in and by the said Act of Parliament, it is enacted (amongst other things), that all and every judgment and judgments, decree or decrees, which should at any time after the passing of the said Act be had or recovered or entered up as therein mentioned, in any action, suit, or proceeding in law or equity, against any public officer of any corporation or co-partnership carrying on the trade and business of bankers, under and by virtue and according to the provisions of the said Act, should have the like effect and operation upon and against the property of such copartnership, and upon and against the property of every such member thereof, as if such judgment or judgments had been recovered or obtained against such co-partnership; and that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership, carrying on the business of banking as aforesaid, under the provisions of the said Act of Parliament, whether as plaintiff or defendant, may be issued against any member or members for *the time being* of such corporation or co-partnership. And whereas J. S. of , near York, now is a member (*f*) of the said co-partnership so carrying on the trade and business of bankers in England, under the provisions of the said Act of Parliament as aforesaid, as by the information of the said J. E., H. B., F. B., C. G., and H. H., in our said Court, before the barons of our Exchequer at Westminster, we have been given to understand. And now on the behalf of the said J. E., H. B., F. B., C. G., and H. H., in our said Court, before the barons of our Exchequer at Westminster, we have been given to understand that although judgment be thereupon given, yet execution of the debt and damages aforesaid still remains to be made to them. Wherefore the said J. E., H. B., F. B., C. G., and H. H. have humbly besought us to provide them a proper remedy in this behalf, and we, being willing that what is just in this behalf should be done, command you that by honest and lawful men of your bailiwick you make known to the said J. S., that he be before the barons of our Exchequer at Westminster, the twenty-second day of November instant, to show if he has or knows of anything to say for himself, why the said J. E., H. B., F. B., C. G., and H. H., ought not to have their execution against him of the

(*f*) See *ante*, book ii. ch. ii. p. 141; and notes to the forms, *ante*.

debt and damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient, to them so to do. And further to do and receive what our said Court before the barons of our Exchequer at Westminster shall then and there consider of him in that behalf. And have you there the names of those by whom you shall so make known to him and this writ. Witness, Sir Frederick Pollock, knight, at Westminster, this day of , in the year of our reign.

FORM OF NOTICE TO BE SERVED WITH PRECEDING WRIT (g).

In the Exchequer.

Between J. E., H. B., F. B., C. G., and H. H. plaintiffs;
and

Joseph Wood, one of the public officers of and for a certain banking company or co-partnership, called the Yorkshire Agricultural and Commercial Banking Company, defendant.

Sir,

Herewith you will receive a copy of a writ of *scire facias* issued in this case, which was issued on the day of instant, and was left in the sheriffs of London public office, on the day of instant, where the same is now lodged. And in default of your appearing thereto, judgment will be obtained thereon against you.

Dated this day of , 18 .

Yours, &c.,

A. B., plaintiff's attorney,
Street, London.

To Mr. J. S., of , near York.

FORM OF AFFIDAVIT OF SERVICE.

In the Exchequer of Pleas.

Between J. E., H. B., F. B., C. G., and H. H., plaintiffs;
and

Joseph Wood, one of the public officers of and for a certain banking company or co-partnership, called the Yorkshire Agricultural and Commercial Banking Company, defendant.

J. C., of the city of York, bookbinder, maketh oath and saith, that he, this deponent, did on the day of , instant, serve J. S. of , in the county of York, with the notice and copy writ of *scire facias* hereunto annexed, by delivering a true copy of the same notice and writ to the said J. S.

Sworn at the city of York, }
the day of , in } J. A.
the year of our Lord, 18 . }

Before G. D. Seymour, a commissioner for taking affidavits in the Court of Exchequer of Pleas.

(g) See *ante*, book ii. ch. ii.

FORM OF JUDGMENT IN SCIRE FACIAS.

In the Queen's Bench.

As yet of Michaelmas Term, 11th Victoria, the
11th day of December, in the year of our
Lord 1848.

County of } To wit, our Lady the Queen sent to her sheriff of the county
Southampton. } of Southampton her writ, closed in these words (that is to
say):

"Victoria," &c. [*here copy the writ verbatim.*]

At which day before our lady the Queen at Westminster, came the said H. B., &c., in their proper persons and the sheriff, to wit, [*name of sheriff*] sheriff of the county of Southampton aforesaid, thereupon now here returned to our said lady the Queen, that by R. M., &c., good and lawful men of his bailiwick, he had given notice to the said J. B., &c., to appear before our sovereign lady the Queen, at Westminster, on the day in the said writ contained, to show cause as by the said writ they are respectively required, or as the said sheriff is thereby commanded; and that the said G. A., &c., had not, nor had either of them anything in his bailiwick whereby he could make known to them, or any or either of them, as by the said writ he, the said sheriff, was commanded, nor were they, the said G. A., &c., nor any or either of them, found in the same. And the said G. A., &c., at that day being solemnly demanded, the said [*those only who appeared*] J. B., &c., respectively come in their own persons, and, hereupon, the said H. B., &c., [*the plaintiffs*], pray that execution may be adjudged to them against the said J. B., &c., [*those who appeared*]; upon the said judgment so obtained as aforesaid, of the debt and damages aforesaid, according to the force, form, and effect of the said recovery, and of the statute aforesaid. And the said J. B., &c., respectively say nothing to bar or preclude the said H. B., &c., from having execution adjudged to them against the said J. B., &c., upon the said judgment so obtained as aforesaid, according to the force, form, and effect of the said recovery, and of the statute aforesaid. Therefore it is considered that the said H. B., &c., have execution against the said J. B., &c., of the debt and damage aforesaid, according to the force, form, and effect of the said recovery, and of the statute aforesaid, by the default of the said J. B., &c. &c. (*h*).

BOOK II. CHAPTER III.

(*Ante*, p. 156.)

REFERENCES TO FORMS OF SCIRE FACIAS ON THE MARRIAGE OF A FEME PLAINTIFF OR DEFENDANT.

See Chitty's Forms, 6th ed. 478, 479, for form of *scire facias* by husband and wife on a judgment recovered by the wife *dum sola*.

The like against husband and wife upon a judgment recovered against the wife *dum sola* (*i*).

(*h*) And see forms in Wordsworth on Joint-stock Companies, 5th ed. Appendix, Form 276.

(*i*) See also forms by husband and wife,

2 Rich. Prac. C. P. 402; Thes. Brev. 256, 265; Clift. 681; Tidd's Prac. Forms, 544, 545, 6th ed. ch. 48, ss. 89, 90, 91; and against husband and wife, Thes. Brev. 247, 251.

And the like for a wife who survived her husband against an executor, the original action having been by husband and wife.

BOOK II. CHAPTER IV.

(See *ante*, p. 163.)

FOR FORMS OF SCIRE FACIAS IN CASES OF BANKRUPTCY AND INSOLVENCY.

See Chitty's Forms, 6th ed. 480, for *Form of scire facias by Assignees on Judgment recovered before the Bankruptcy*.

And see the like, Tidd's Forms, 6th ed. 545.

As to pleadings, see *Baylis v. Hayward*, 4 Ad. & El. 256; *Herbert v. Sayer*, 2 D. & L. 57; *Swan v. Sutton*, 10 Ad. & El. 623; *Dunn v. Hill*, 11 M. & W. 470.

BOOK II. CHAPTER V.

(*Ante*, p. 174.)

REFERENCES TO FORMS OF SCIRE FACIAS IN THE CASE OF THE DEATH OF A PLAINTIFF OR DEFENDANT.

See the forms of the several writs of *scire facias* referred to in the text collected in Chitty's Forms, 6th ed. 469 to 478. Tidd's Forms, 6th ed. 546 to 572.

BOOK II. CHAPTER VI.

(*Ante*, p. 200.)

REFERENCES TO FORMS OF SCIRE FACIAS AGAINST AN EXECUTOR OR ADMINISTRATOR ON A JUDGMENT OF ASSETS QUANDO ACCIDERINT.

See form No. 27, Chitty's Forms, 6th ed. 505. Tidd's Forms, 6th ed. 539. See *Smith and another v. Tateham and another*, 2 Exch. Rep. 205.

See form of *scire fieri* inquiry in Queen's Bench, after a return of *nulla bona testatoris*, Chitty's Forms, 506; and return of a *devastavit* and *nil*, and inquisition thereon, *Ibid*.

See form of declaration in *scire facias* on a judgment of assets *in futuro*, 2 Wms. Saund. 6th ed. 218 *a*.

Form of judgment of assets *in futuro* on plea of *plene administravit*, or plea of *plene administravit præter* a judgment or specialty debt. Chitty's Forms, No. 7, p. 496; and see the forms, *Ibid*, 498, 499, 500.

BOOK II. CHAPTER VII.

(*Ante*, p. 206.)

FOR REFERENCES TO FORMS OF SCIRE FACIAS ON BILLS OF EXCEPTIONS,

See form of *scire facias* in Q. B. to a judge to acknowledge or deny his seal to a Bill of Exceptions.

Money and others v. Leach, 3 Burr. 1692. See also form in *Thurston v. Slatford*, Lutw. 906, 906. And see Rast. Ent. 293 *b*, 275, 323; Brownlow's

Ent. 131; Lilly's Ent. 275; Bull. N. P. 317; *Fabrigas v. Mostyn*, 11 Stat. Tri. 187, 188.

See also *Davies v. Lowndes*, 1 Scott, N. B. 377.

As to form of Bill of Exceptions, see Chitty's Arch. Forms, 89.

BOOK II. CHAPTER VIII.

(*Ante*, p. 213.)

REFERENCES TO FORMS OF SCIRE FACIAS AD AUDIENDUM ERRORES,
ON CHANGE OF PARTIES.

See form of *scire facias ad audiendum errores*, on error from the Common Pleas, Tidd's Forms, 6th ed. 599, § 63.

And the like on judgment in *scire facias* against terretenants. *Ibid.* § 64.

BOOK II. CHAPTER IX.

(*Ante*, p. 215.)

FOR FORMS OF SCIRE FACIAS TO REVIVE A JUDGMENT IN EJECTMENT,
See Chitty's Forms, 445, form 14; *Ib.* form 15. Tidd's Forms, 657, 658.

BOOK II. CHAPTER X.

(*Ante*, p. 218.)

FORMS OF SCIRE FACIAS AGAINST THE SHERIFF BY THE EXECUTION CREDITOR.

For a form of *scire facias* against a sheriff to recover the value of goods seized by him under a *fi. fa.* and returned as of a certain value, but which were afterwards rescued, see *Mildmay v. Smith and another*, 2 V. Wms. Saund. 6th ed. 338 a.

Other forms may be readily adapted from this precedent, if required.

BOOK II. CHAPTER XI.

(*Ante*, p. 220.)

REFERENCES TO FORMS OF SCIRE FACIAS IN CASES OF OUTLAWRY.

For form of *scire facias* to warn the creditor of the reversal of the outlawry by statute, or by the Queen's pardon, see Trye's *Jus Filizarii*, 134, 155.

And see Tidd's Forms, 6th ed. 60, §§ 38, 39, and entry of return thereto, *Ib.* 61.

BOOK III. CHAPTER II.

(*Ante*, p. 235.)

SCIRE FACIAS TO REPEAL LETTERS PATENT.

New Orders in Chancery.

The following orders relating to the practice on the common-law side of the Court of Chancery, dated the 29th of December, 1848, have been amended

since the last statute, by order of the Lord Chancellor and the Master of the Rolls, dated the 3rd of August, 1849; and by which order the 11th and 12th of the general orders of the 29th of December, 1848, are abrogated and discharged. The amended orders are as follows:—

1. All former rules and orders regulating the practice and proceedings of the Petty Bag office, so far as the same are now in force, and are consistent with the said Act of Parliament and with these orders, are to remain in full force and effect.

2. These orders as to all suits, matters, and proceedings now pending, or hereafter to be commenced, are (so far as the same are applicable to the state of such matters and proceedings) to take effect on the 1st day of January, 1849.

3. In the office of the Petty Bag, the office is to be open and closed on the same days; the vacations are to be observed at the same time, and the clerk is to attend in the office during the same hours as are for the same purposes, and in relation to the same matters, appointed by the general rules of the Court of Chancery in the office of the Clerks of Records and Writs, subject, nevertheless, to such alterations as for some special reasons may be at any time made by the Lord Chancellor, with the advice and assistance of the Master of the Rolls.

4. The Clerk of the Petty Bag is to have the care and custody of the common-law seal, and is to use and employ the same for sealing such several writs and all such documents and writings as are by the said Act authorized to be sealed with the same seal.

5. Affidavits, affirmations, and declarations to be used in any proceeding on the common-law side of the Court, are to be sworn, affirmed, or declared before the Clerk of the Petty Bag, or before a Master Extraordinary of the High Court of Chancery, and are to be filed in the office of the Petty Bag.

6. Every writ, rule, or document issued or delivered out of the Petty Bag office is to be tested or dated on the day on which the writ is sealed or the rule or document is made.

7. Every writ returned by the sheriff is to be immediately filed, and thereupon the day and hour of the filing are to be endorsed on the writ.

8. The Clerk of the Petty Bag, upon receiving the return of the transcript of the verdict of the jury and proceedings or judgment of any Court of common law upon any issue in law or in fact, is to file the same in the Petty Bag office, and is to cause an entry to be made of such verdict and proceedings or judgment, and such transcript is to be annexed to the original record in the Petty Bag office, and thereupon the judgment of the Court of common law is to be entered on or annexed to the same record, in conformity with the judgment of the Court from which the transcript is returned.

9. Every solicitor whose name is duly enrolled as such in the High Court of Chancery may act as an attorney in any action, suit, or proceeding pending on the common-law side of the same Court, and is to be therein named and treated as the attorney of the party by whom he is retained.

10. Any party changing or ceasing to employ his attorney in the course of an action, suit, or proceeding is to cause an entry of such change or cessation of employment to be made and entered with the Clerk of the Petty Bag, and

to cause notice of such change or cessation of employment, and of such entry, to be served on every party to the action, suit, or proceeding; and until such entry and notice shall have been made and served the former attorney is to be deemed and taken for all purposes of the action, suit, or proceeding, to be and remain the attorney of the party.

13. The proceedings and trial in an action of *scire facias* may take place and be had in such one of Her Majesty's superior Courts of common law as may be chosen by the party applying to have the writ sealed.

14. A writ of *scire facias* to revoke letters patent is not to be sealed—1. until the fiat of the Attorney-General is filed in the Petty Bag office; 2. until the name of some one of Her Majesty's superior Courts of common law is indorsed or written thereon; 3. until a true copy of the writ and of any drawing or plans annexed thereto (to be verified by affidavit) has been filed in the Petty Bag office.

15. If such writ has been sealed before the 1st of January, 1849, and the record of the action has not been carried or transmitted into the Court of Queen's Bench, the name of some one of Her Majesty's superior Courts of common law is to be indorsed on the writ, and a memorandum thereof entered with the Clerk of the Petty Bag office before any subsequent proceeding is taken in the action.

16. The trial and any proceedings in an action of *scire facias* are to take place in the Court of common law the name of which is indorsed or written on the writ.

17. A bond of indemnity against costs to be incurred in the prosecution of an action of *scire facias* may (if so desired by the Attorney-General) be taken in the name of the Clerk of the Petty Bag, but the same is not to be deposited or filed in the office of the Petty Bag unless the intended obligors, and the sums for which they are to give security, be named by the Attorney-General.

18. A bond of indemnity filed or deposited in the Petty Bag office may, at the request of the Attorney-General, be put in suit under such circumstances, and upon such terms and conditions, as the Lord Chancellor or the Master of the Rolls may approve of.

19. An appeal is to be entered by or on behalf of any defendant who has been summoned by the sheriff within eight days after the writ of *scire facias* has been returned and filed.

The Clerk of the Petty Bag office is, until further orders, to receive and take the several fees which are set forth in the schedule hereunder written, and is to account for the same, and pay the amount thereof into the Suitors' Fee Fund, in the same manner and at the same times as the clerks of records and writs receive and pay the fees received by them in their office.

(Here follows the schedule of fees above referred to.)

Forms.—For forms of *scire facias* to repeal letters patent for an invention, see Abbott's Forms of Writs on the Common-law Side of the Court of Chancery, 86, form 87. Hindmarch on the Law of Patents, 710.

For form of bond of indemnity against costs on prosecution of *scire facias* entered into with the senior Clerk of the Petty Bag, see Abbott's Forms of

Writs on the Common-law Side of the Court of Chancery, 92, form 88.
Hindmarch on Patents, 708.

For form of *testatum scire facias*, see **Abbott's Forms of Writs** on the Common-law Side of the Court of Chancery, 96, form 89. **Hindmarch** on Patents, 715.

For form of declaration in *scire facias* to repeal letters patent, see **Abbott's Forms of Writs** on the Common-law Side of the Court of Chancery, 97, form 90. **Hindmarch** on Patents, 717.

For form of sheriff's warrant to his bailiffs to summon the defendant, see **Hindmarch** on Patents, 716.

For form of rule to return the writ of *scire facias*, see **Hindmarch** on Patents, 717. And see the New Orders in Chancery, *ante*, No. 6.

See form of rule to answer, **Hindmarch** on Patents, 718; and New Orders in Chancery, *ante*, No. 6.

See form of *nolle prosequi* after declaration and before plea to some of the suggestions in a *scire facias*, **Hindmarch** on Patents, 718.

See form of plea in abatement that the defendant has assigned the patent, **Hindmarch** on Patents, 719. (But see *Reg. v. Betts and Stocken*, 19 L. J., N. S., Q. B. 531.)

See form of demurrer to the whole declaration, **Hindmarch** on Patents, 720. Demurrer to one of the suggestions in a *scire facias*, *Ibid.* 721.

Form of special demurrer, *Ibid.* 721.

Joinder in demurrer by the Attorney-General, *Ibid.* 722.

Form of pleas in bar to the suggestions in a writ of *scire facias*, *Ibid.*

Form of issue, *Ibid.* 727.

See other forms of pleas, and forms of *venire facias* out of Chancery, returnable in the Queen's Bench, and form of Chancery record, and record in the Queen's Bench of the transcript of the Chancery record to have issues in fact tried, **Hindmarch** on Patents, 726, 727, 728, 729.

Form of Attorney-General's warrant for a *nisi prius*, **Hindmarch** on Patents, 731; and forms to the *postea*, and record of the *postea*, and remand of it into Chancery for judgment, *Ibid.* 733, 734.

Form of judgment for the Crown in Chancery, **Hindmarch** on Patents, 735.

Form of entry of day given to defendant to bring in the patent to be cancelled, **Hindmarch**, 736; and form of notice to the defendant of the day appointed for bringing it in, *Ibid.* 737.

Form of order that the enrolment of the patent be cancelled, **Hindmarch**, p. 737; and *vacatur* of the patent, *Ibid.* 738.

BOOK III. CHAPTER III.

(*Ante*, p. 278.)

REFERENCES TO FORMS OF SCIRE FACIAS ON RECOGNIZANCES.

For various forms of recognizances, see **Corner's Crown Practice**, Append.

For a form of *scire facias* on a recognizance acknowledged in Chancery, see **Abbott's Forms of Proceedings in Chancery**, 99, form 91.

Testatum clause, *Ibid.* 100, form 92.

For form of declaration in *scire facias* on a recognizance in Chancery, see **Abbott's Forms of Proceedings in Chancery**, 101, form 93.

For form of judgment by default on a *scire facias* on a recognizance, see Abbott's Forms of Proceedings in Chancery, 102, form 94.

For forms of issue on the *scire facias*, notice of trial, record of issue for trial in the common-law Court, transmission of the record of issue into the common-law Court for trial and *venire*, see Abbott's Forms of Proceedings in Chancery, 103, 104, 105.

See form of *certiorari* to remove a recognizance, Corner's Crown Practice. Append. 56, form 62.

For form of *scire facias* against defendant and bail for not proceeding to trial pursuant to recognizance, see Corner's Crown Prac. Append. 158, form 210; and 2 Gude, Append. 661.

For form of *scire facias* against defendant and bail upon a recognizance removed by *certiorari*, see Corner's Cr. Pr. Append. 159, form 211.

For form of *levari facias* against defendant and bail on judgment on *scire facias* on a forfeited recognizance, see Corner's Cr. Pr. Append. 160, form 212.

For form of record of *nisi prius* on *scire facias* on recognizance for breach of the peace, see Corner's Cr. Pr. Append. 195, form 227; and 2 Gude, Append. 663.

BOOK III. CHAPTER IV.

(*Ante*, p. 303.)

FORMS OF SCIRE FACIAS ON RECOGNIZANCE OF SPECIAL BAIL.

For form of *præcipe* for a *scire facias* against bail, see Chitty's Archbold's Forms of Practical Proceedings, 6th ed. 265, form 7.

For form of *scire facias* upon a recognizance in Queen's Bench, where the defendant has been held to bail, see Chitty's Forms of Pr. 6th ed. 265, form 8; *Ibid.* in C. P. 266, form 9; *Ibid.* in Exchequer, 266, form 10.

For form of warrant on the writ, see Chitty's Forms of Pr. 267, form 11. Form of summons on the warrant, *Ibid.* 267, form 12.

For form of notice to bail of *scire facias* being lodged in the sheriff's office against them where they are not summoned, see Chitty's Forms of Pr. 268, form 13.

For form of affidavit to obtain leave of Court or of a judge to sign judgment against bail on return of *nihil* to one *scire facias*, see Chitty's Forms of Pr. 268, form 16.

For forms of entry on roll in Queen's Bench or Exchequer of judgment by default where no appearance, see Chitty's Forms of Pr. 270, form 20.

The like in C. P. *Ibid.* 271, form 21.

For form of entry on roll in Queen's Bench or Exchequer of judgment by default after appearance for want of a plea, see Chitty's Forms of Pr. 273, form 28.

For forms of issue in *scire facias* against bail in Queen's Bench, see Chitty's Forms of Pr. 273, form 29; and for forms of *nisi prius* record, jury process, entry of judgment after verdict, and *fi. fa.* or *ca. sa.* against bail after judgment in *scire facias*, see *Ibid.* 274, *et seq.*

BOOK III. CHAPTER V.

(Ante, p. 320.)

FORMS OF SCIRE FACIAS ON RECOGNIZANCE AGAINST BAIL IN ERROR.

For form of entry of the recognizance on error from the Queen's Bench, see Chitty's Forms of Pr. 6th ed. 278, form 1. The like on error from the C. P., *Ibid.* 279, form 2. The like on error from the Exchequer, 280, form 3. The like on error to the House of Lords after judgment of affirmance in the Exchequer chamber, 281, form 4.

For form of *præcipe* for the *scire facias*, see Chitty's Forms of Pr. 6th ed. 281, form 6.

For form of *scire facias* upon recognizance in error from Queen's Bench in the Exchequer Chamber, see Chitty's Forms, 282, form 7. The like upon recognizance in error from C. P., *Ibid.* 283, form 8.

BOOK III. CHAPTER VI.

(Ante, p. 327.)

FORMS OF SCIRE FACIAS AGAINST PLEDGES IN REPLEVIN, AND AGAINST THE SHERIFF.

For form of *scire facias* against the pledges for a return, after judgment of *non pros.* for want of a declaration, see Tidd's Forms, 6th ed. 695, § 85. The like on a plaint levied in the Sheriff's Court of London, and removed into the Queen's Bench by *certiorari*, *Ibid.* 696, § 86.

BOOK III. CHAPTER VII.

(Ante, p. 330.)

FORMS OF SCIRE FACIAS ON BOND TO THE CROWN.

For form of writ of *scire facias* for the Queen on a bond in the Exchequer, see Tidd's Forms of Pr. 6th ed. 484, § 1; declaration thereon, *Ibid.* § 2; rule to appear, *Ibid.* 485, § 3; rule to plead, *Ibid.* § 4.

For form of *scire facias* on bond or recognizance of receiver in Chancery, see Abbott's Forms of Writs on the Common-law Side of the Court of Chancery, 99, form 91. Testatum clause, *Ibid.* 100, form 92. Declaration thereon in the Petty Bag, *Ibid.* 101, form 93. Form of judgment by default thereon, *Ibid.* 102, form 94. Form of issue thereon, *Ibid.* 103, form 95. And see also forms of notice of trial, record of issue for trial in the Common-law Court; Transmission of the record of issue into the Common-law Court for trial, and *Venire*, *Ibid.* 104, 105.

And for a form of *scire facias* on bond to the Crown, see Tremaine's Pleas of the Crown, 608.

BOOK III. CHAPTER VIII.

(Ante, p. 341.)

FORMS OF SCIRE FACIAS ON INQUESTS OF OFFICE TO RECOVER SIMPLE-
CONTRACT DEBTS DUE TO THE CROWN.

For form of commission to find debts, see Tidd's Forms of Pr. 6th ed. 446. West on Extents, App. 1.

For form of inquisition on the commission, see Tidd's Forms of Pr. 6th ed. 467. West, App. 3.

For form of *scire facias* upon the return of a writ of *inquirendum* on an inquisition of a coroner of *felo de se*, see 2 Gude's Practice, 665.

I N D E X.

ABATEMENT.

Plea to, 352.

Plea of, to *scire facias* to repeal a patent, 280.

ACTION.

Scire facias, in nature of, 13.

AD AUDIENDUM ERRORES.

Scire facias on change of parties, 213, 367.

ADMINISTRATION.

De bonis non, 198.

ADMINISTRATOR.

De bonis non, may revive decree in Equity, 199.

ADMINISTRATOR DURANTE MINORE ÆTATE, 191.

AD REHABENDAM TERRAM, 58.

AGREEMENT.

To stay execution, *scire facias* not necessary, 8, 67, 69.

AMENDMENT.

Of *scire facias*, 20, 168, 349.

practice on, 373, *et seq.*

against bail, 318.

of judgment, as to the time, 196.

APPEARANCE.

To *scire facias*, to repeal a patent, 256.

ASSETS.

Quando, judgment of, 367.

ASSIGNEES.

When actions to be commenced in the names of, 163.

Action may be continued by, in the name of the bankrupt, 165.

Cannot make themselves parties to the record till after judgment, 166.

Not entitled to judgment-debt, levied by sheriff, before bankruptcy, 167.

ASSIGNMENT.

Of patent, 244.

Of bankrupt's property to assignees, 163.

ASSIZES.

But one day in law, 181.

ATTORNEY.

New warrant and retainer to sue out *scire facias*, 349.

AUDITA QUERELA.

When defendant is called on over again to pay forfeited recognizance, 301.

BAIL.

To the action, old practice, as to, 303.

Below, 304.

Above, or special bail, 304.

Piece, entering on the roll and docketing, 304.

What circumstances will exonerate, 307.

1. Payment of debt and costs by, 307.

Liability of, to costs of *scire facias*, 308.

2. Death of principal, before return of *ca sa.*, 308.

3. Bankruptcy of principal, 308.

4. Insolvency of principal, 309.

5. Render of principal, 309.

6. Variance in declaration from affidavit to hold to bail, 310.

7. Giving time to principal, 311.

8. Alteration of defendant's position, 312.

Proceedings by *scire facias* against, 313.

In error, recognizance of, 320.

depositing money in lieu of, 323.

statutes requiring, extend only to cases where judgment given for the original plaintiff, 323.

amount of to be entered into, 323.

to what they bind themselves by their recognizance, 323

cannot discharge themselves by rendering their principal, 324.

engagement of, is absolute, to pay the debt and costs, 324.

pleas to *scire facias* by, 325.

before Parliament, 325.

recognizance of, in misdemeanors, 325.

BANKING.

Copartnerships, since 7 & 8 Vict. c. 113, *scire facias* not necessary, 90.

BANKRUPT.

Disabled from continuing a suit, 165.

BANKRUPT—*continued*.

Joint-stock Company, whether *scire facias* necessary, 172.
 Law Consolidation Act, 164.

BANKRUPTCY.

After action brought, not an abatement of the suit, 165.
 Of plaintiff cannot be pleaded to a *scire facias* by the bankrupt, 170.
 Of plaintiff may be pleaded in bar, 165.
 Of plaintiff or defendant, *scire facias* in case of, 365.

BANKRUPTS.

Certificate, exonerates him from costs of *scire facias*, 169
 Property, assignment of, 163 to 170.

BILL OF EXCEPTIONS.

Scire facias on, 206, 211, 367.
 Origin of, 206.
 For what it lies, 208.
 Does not extend to criminal cases, 209.
 Proceedings on, 210.
 On trial on *scire facias* to repeal a patent, 269.

BOND.

Debt on, *scire facias* to recover demands after judgment, 31.
 Only security to the amount of the penalty, 37, 39.
Scire facias on further breaches of, 37.
 Breaches of, when to assign and when to suggest, 44.
 To the Crown, nature of, 330.
 scire facias on, 371.
 made of the same force and effect as a statute
 staple, 330, 333.
 may be put in execution by extent, when debt is in
 danger, 331.
 from what time binds lands of Crown debtor, 334.
 practices on *scire facias* on, 335.
 service and appearance to the writ, 336.
 To secure debt of the Crown, *scire facias* on, 233, 371.
 Of indemnity for costs in *scire facias* to repeal patent, 250, 276.

CANCELLING.

Of Letters Patent, 272.

CAPIAS.

Cannot issue on *scire facias*, 22, 351.

CA. SA.

Issued in lifetime of judgment creditor may be executed after his
 death, 193.
 Suing out against principal, before proceeding against bail, 313.
 Proceedings on, 314.
 For residue of debt, 316.

CERTIORARI.

To remove forfeited recognizance into the Crown office, 299.

CESSET EXECUTIO.

Where *scire facias* not necessary, 8, 68.

CHANCERY.

Common-law seal, 252.

Recognizance, certified into, 281.

CLASS.

Of shareholders of a Joint-stock Company primarily liable for the debts of the company, 128.

CLASSES.

Of persons liable for debts of Joint-stock Companies, 126.

COLLATERAL.

Facts, suggestion sufficient, 102.

COMMISSION.

To inquire, as to Crown debts, 342.

COMPANIES CLAUSES CONSOLIDATION ACT.

Scire facias against members of companies under, 361.

CONTEMPT.

Of Court, in not restoring Letters Patent into Chancery after judgment for the Crown, in *scire facias*, 274.

COURT OF CHANCERY.

Recognizances entered into by order of, 281.

COSTS.

Are recoverable on judgment, by default in *scire facias*, 196.

On judgment, 5.

On *scire facias* by assignees, 168.

generally, 357.

on bond to the Crown, 339.

to repeal a patent, 276.

to have execution of recognizance, 301.

CROWN.

Demise of, proceedings on *scire facias* to repeal a patent do not abate by, 277.

in case of, *scire facias* not necessary, 10, 29, 94.

Scire facias for debt of, secured by bond, 233.

to have execution of forfeitures to, 233.

forfeited recognizance, not necessary, when, 291.

when necessary for, 291.

CROWN OFFICE.

Scire facias issues out of, in Crown cases, 296.

DAMAGES.

Cannot be given in a *scire facias* for delay of execution, 196.

DEATH.

Of one of several plaintiffs or defendants pending the suit, 176, 366.

when it happens before declaration, 177.

after declaration, *ib.*

before interlocutory judgment, *ib.*

Of plaintiff or defendant between verdict and judgment, 180, 183.

before verdict, and after the assizes begin, 181.

before interlocutory judgment, 186.

after interlocutory, and before final judgment, 186, 366.

after the writ of inquiry is executed, 187.

after final judgment and before execution, 188.

Of obligor of bond to the Crown, 337.

DEBT.

Scire facias to recover residue of, after eviction under an *elegit*, 47.

DEBTS.

Of wife, how recovered, 156.

Accruing to wife during marriage, 157.

Due by wife, recovery of, 158.

May be brought on judgment in *scire facias*, 197.

DECLARATION.

In *scire facias* to repeal a patent, 257.

DEFAULT.

Of one of two defendants on a joint bond to the Crown, 337.

DEFENCE.

Cannot be pleaded to *scire facias* which could have been pleaded to the original action, 145, 353.

DELIVERY.

Of transcript of Chancery record, 264.

DEMURRER.

To *scire facias* to repeal a patent, 261.

DEPOSITING.

Money in lieu of bail, 323.

DISCLAIMER.

Of patent, entry of, 242.

DOCKETING.

Of judgment, 196.

And entering bail-piece, 304.

EJECTMENT.

Scire facias in, 23, 215, 368.

ELEGIT.

- Scire facias* necessary when not issued within a year, 24.
- Nature of, 48.
- Effect of 10th sect. of Statute of Frauds on, 49.
- All a debtor's lands may now be extended under, 50, 179.
- In case of the King, 51.
- Why so called, *ib.*
- Formerly a full satisfaction of the debt, 52.
- Though the debt were unsatisfied by the plaintiff's eviction, *ib.*
- Where tenant by, evicted, *scire facias* for residue of debt, 55.
- Where part of the lands remain in execution under, *ib.*
- When in nature of a *fi. fa.*, *ib.*
- Scire facias* on, why necessary, 56.
- Form of writ of *scire facias* on, 57.

ENROLMENT.

- Office, seal of, 253.
- Of recognizances, 280, 281.

ERROR.

- Writ of, *scire facias* not necessary, 8, 70.
- Writs of, rule as to, at Common Law, 320.
- Writ of, on judgment for the Crown on *scire facias* to repeal a patent, 275.
- fiat of Attorney-General necessary before issuing, *ib.*

ESTREAT.

- Of recognizances forfeited at sessions, 288.
- Before Parliament and the superior Courts, 289.
- New rules of practice as to, 290.

EXCEPTIONS.

- When *scire facias* not necessary, 8, 67.

EXCHEQUER.

- Court of, jurisdiction over recognizances, 288, 289.

EXECUTION.

- Writs of, at Common Law, 47.
- Voidable if issued after a year without *scire facias*, 24.
- When irregular, 24.
- Must follow the judgment, 108, 161.
- Cannot issue against a shareholder of a joint-stock company under 7 & 8 Vict. c. 110, without notice, 152.
- May issue against shareholders of a joint-stock company, under 7 & 8 Vict. c. 110, at the suit of creditors as well as shareholders, 152.
- To husband and wife, on judgment obtained by wife, *dum sola*, 161.
- On joint judgment may be levied on one defendant, 177.

EXECUTOR.

Scire facias must issue against, on judgment obtained against testator, to make him a party to the judgment, 193.

EXECUTORS AND TERRETTENANTS.

Scire facias against, 217.

EXTENT.

In aid, *scire facias* not necessary before issuing, 97.

On bonds to the Crown, 331.

FEME SOLE.

Scire facias by or against, when afterwards married, 159, 160, 161.

Judgment obtained by, who afterwards marries, 160.

against, who afterwards marries, 161.

FEEES.

Of the Petty Bag Office, 253.

FIAT.

Of the Attorney-General, to authorize issuing of *scire facias* to repeal a patent, 249.

FI. FA.

Issued in lifetime of judgment creditor may be executed after his death, 193, 194.

FORFEITURES.

To the Crown, *scire facias* to have execution of, 233.

FORM.

Of declaration in *scire facias* to repeal a patent, 258.

Of recognizances entered into by order of the Court of Chancery, 281.

of special bail, 307.

scire facias to have execution of forfeited recognizances, 291.

on, 316.

bond to the Crown, 335.

HEIR AND TERRETTENANTS.

Scire facias against, 178.

HUSBAND.

When, must join in an action to recover debts due to his wife, 156.

May sue alone for wife's debts, 156.

Must be made party to the judgment of wife, in wife's lifetime, 161.

INDORSEMENT.

Of name of Superior Court on writ of *scire facias* to repeal patent, 249.

INJUNCTION.

To stay execution, *scire facias* not necessary, 8, 70.

To restrain infringement of patent, 244.

INQUEST OF OFFICE.

What it is, 342.

Origin of, 342.

INQUISITION.

To find simple-contract debts due to the Crown, *scire facias* not necessary, 10.

When returned a record, 343.

Should be certain, 343.

What debts may be found by, 344.

Scire facias on, 344, 372.

INSOLVENCY.

Of plaintiff or defendant, *scire facias* in case of, 365.

INSOLVENTS.

Effect of statutes relating to, 170.

Effects vest in assignees, 171.

Personal labour of, does not pass to assignees, 172.

INTERLOCUTORY JUDGMENT.

Scire facias on, 27.

Before bankruptcy, effect of, 166.

IRREGULAR.

To suggest death of nominal plaintiff on *nisi prius* record, after issue joined without leave of the Court, 117.

IRREGULARITY.

In *scire facias*, when waived, 26, 337.

JOINT JUDGMENT.

Execution on, may be levied on one, 177.

JOINT SCIRE FACIAS.

When necessary, 20.

And several, 21.

JOINT-STOCK COMPANIES.

Since 7 & 8 Vict. cc. 110, 113, *scire facias* not necessary, 90.

When members of, primarily, and when secondarily liable to debts of company, and when exempt, 121, 127.

All members of, primarily liable, need not be proceeded against 124.

Winding-up Act, effect of, 153.

Members of, under the Companies Clauses Consolidation Act, 361.

JOINT-STOCK COMPANY.

Bankruptcy of, 172.

JUDGE'S ORDER.

For judgment on *scire facias* against bail, setting aside, 319.

JUDGMENT.

Costs on, 85.

More than a year old, must be revived by *scire facias*, 6.

Cannot be impeached on motion for *scire facias*, 27.

In debt on bond at Common Law, 33.

On warrant of attorney against public officer, 150.

Obtained by *feme sole* who afterwards marries, 160.

In case of death of plaintiff or defendant before verdict, must, under 17 Car. II. c. 8, be signed within two terms after verdict, 182, 184.

Entry of, *nunc pro tunc*, 184.

Must be entered of record when signed, 185.

Obtained within a year before testator's death will bind the testator's goods, 194.

By default on *scire facias* to repeal a patent, 256.

To cancel letters patent, 272.

For the Crown in *scire facias* to repeal a patent may be pleaded in bar in action for infringement of patent, 274.

Reversal of, reversal of *scire facias* on, 351.

Of assets *quando*, *scire facias* on, 367.

JURY.

Must assess damages on breaches assigned of a bond, 39.

LETTERS PATENT.

What they are, 236.

For what granted, 236, 239.

Delivered to the patentee as his evidence of title, 237.

The right to grant, a prerogative of the Crown, 238.

Restrained by the Statute of Monopolies, 238.

Effect of, 239.

when voidable, 243.

Why granted, 239.

Cannot be granted for an abstract principle, 241.

Title of, 241.

Enrolment of, the specification, 241.

Grounds for, why void, 242.

Entry of disclaimer, 242.

Injunction to restrain infringement of, 244.

Assignment of, 244.

How made void, 244.

Construction of, 244.

Scire facias to repeal, 245.

an original writ, 247.

Fiat of the Attorney-General necessary to authorize the issuing of the writ, 249.

Bond of indemnity for costs on *scire facias* to repeal, 250.

Form of *scire facias* to repeal, 250.

LETTERS PATENT—*continued*.

Scire facias to repeal, when may be issued, 251.

On *scire facias* to repeal, who must be made defendants, 251. *See*

SCIRE FACIAS TO REPEAL LETTERS PATENT.

Scire facias to repeal may be tried at bar or at *nisi prius*, 265.

Judgment to cancel, 272.

Restoration of, into Chancery, 274.

LIMITATION.

Of the writ of *scire facias*, 14, 29.

Of judgment on, 351.

MARRIAGE.

Effect of, 156.

Of *feme sole* in ejectment, *scire facias* on, 217.

Of *feme* plaintiff or defendant, *scire facias* on, 156, 365.

MELIUS INQUIRENDUM, 346.

MEMBERS.

For the time being of joint-stock companies, meaning of, 126.

MONSTRANS DE DROIT, 346.

MOTION.

For *scire facias* on judgment above ten years old, 14.

Against members of joint-stock companies secondarily liable, 123, 147.

In arrest of judgment on *scire facias*, 357.

For an issue to try matters which might have been raised by plea to an action against a public officer, where judgment signed under a warrant of attorney, 150.

NEW.

Party to the judgment, *scire facias* necessary, 6, 113, 114.

Scire facias, when necessary, 27.

must recite previous *scire facias*, 27, 352.

Trial on *scire facias* to repeal a patent, 271.

NOMINAL.

Plaintiff or defendant added to the record, *scire facias* not necessary, 104.

NON EST INVENTUS.

Sheriff's return of, to *ca. sa.*, in proceedings against bail, 315.

NONSUIT.

Of plaintiff in *scire facias*, 28, 352.

NOTICE.

To member of joint-stock company before applying for leave to issue *scire facias* against him, 122.

Required before issuing execution against shareholder of joint-stock company under 7 & 8 Vict. c. 110, 152.

If insufficient, application may be renewed, 152.

NOTICE—continued.

To defendant on *scire facias* to repeal a patent, 256.

Of trial on *scire facias* to repeal patent, 264.

NUL TIEL RECORD.

Plea of, to *scire facias*, 353.

After plea of, *scire facias* not amendable, 376.

NUNC PRO TUNC.

Entry of judgment, 184.

OMISSION.

To sue out *scire facias*, when necessary, 29.

ORIGINAL WRIT.

When *scire facias*, 12, 13.

When in nature of, 13.

OUTLAW.

To recover debts and choses in action due to, 222.

OUTLAWRY.

Scire facias in cases of, 220, 368.

Consequences of, 221.

Reversal of, by Statute or Pardon, 224.

PARLIAMENT.

Bail on error before, 325.

PATENT.

Scire facias to repeal, 12, 228, 368.

When it lies, 228.

What it is, 236.

For what granted, 336, 239. See **LETTERS PATENT.**

Entry of vacation of, on the roll, 275.

Revocation of grant of, 277.

PATENTEE.

May sue for infringement of patent, 243.

PATENTEES.

Right can only be infringed by judgment of the Court, 227.

PERSONAL.

Representative of a deceased party must issue *scire facias* to revive judgment-debt due to deceased, 186.

PETITION OF RIGHT, 346.**PLEA.**

Of payment to, 352.

Should be to the writ, 352.

PLEAD.

Further time to, 337.

PLEADING.

- Defence which could have been pleaded to the original action, 145.
- To *scire facias* to repeal letters patent, 259—261.
- On *scire facias* on bond to the Crown, 337, 338.
- To *scire facias* on inquisition, 345.

PLEAS.

- To, must be delivered, 261.
- To *scire facias* by executor or administrator, 194, 196.
 - on recognizance, 300.
 - of bail in error, 325.
 - generally, 352.
- To, against members of joint-stock companies, 361.

PLEDGES.

- In replevin, *scire facias* against, 327, 371.

PLENE.

- Administravit præter* judgments, 204.

PRACTICE.

- Of the Court, cannot be pleaded in answer to an existing judgment, 196.
- On *scire facias*, to repeal a patent, 266.
 - on bond to the Crown, 339.
 - on inquisition, 345.
 - generally, 354.

PRAYING.

- A tales on trial on *scire facias* to repeal a patent, 268.

PROCLAMATION.

- On trial, on *scire facias* to repeal a patent, 269.

PROFERT.

- Of letters testamentary, 194.

PROVISO.

- Trial by, to repeal a patent, 266.

PUBLIC.

- Company, officer of, *scire facias* not formerly required to charge a member, 7.
- Now necessary, 7.
- Not necessary in case of companies, under stat. 7 & 8 Vict. cc. 110, 113, 8, 90, 151.
- Nor where execution suspended by agreement, 8, 67.
- Nor where *cesset executio*, 8.
- Nor where writ of error, 8, 66.

PUBLIC—*continued*.

Nor where defendant has obtained an injunction to stay execution, 8, 70.

Officer, judgment against, execution may issue against him without a *scire facias*, 117.

Compulsory to proceed against him; and not against members of company, 118, 145.

Also to sue in his name, 119, 147.

Exceptions to this ruling, 148.

Will be presumed to continue such till the contrary be shown, 119.

Cannot plead his own bankruptcy in bar to an action against the company, *ib*.

Cannot plead that he has ceased to be such public officer, without an affidavit of its truth, 120.

QUANDO.

Acciderent, scire facias on judgment of assets, 200.

Form of, judgment of, *ib*.

Praying judgment of an admission that no assets, 201.

The judgment of, comprises all assets in executor's hands, after issuing writ, whether anterior or posterior to the judgment, 203.

Effect of, after plea of *plene administravit præter*, 204.

Judgment of, may be prayed in a County Court, *ib*.

Costs on judgment of, 205.

QUARE.

Restitutionem non, 64.

QUASHING.

Writ of *scire facias*, 26, 349.

RECOGNIZANCE.

In the nature of a statute staple, 9, 81, 302.

Scire facias not necessary on, 83, 302.

to have execution of, 229, 282, 369.

At common law, *scire facias* to have execution of, 232.
what, 279.

Before whom may be acknowledged, *ib*.

In what respect it differs from a bond, 280.

Must be enrolled, 280, 281.

How witnessed, *ib*.

Certified into Chancery, *ib*.

When entered into by order of the Court of Chancery, *ib*.

Form of, when so entered into, *ib*.

When forfeited, proceedings on, 282.

Before justices of the peace, 283.

When forfeited, how certified formerly, *ib*.

RECOGNIZANCE—*continued.*

Present practice on, when forfeited, 285.

Magistrate may commit for refusal to enter into, 287.

When taken, is a record, *ib.*

Justices may mitigate or discharge, *ib.*

When forfeited, Quarter Sessions only have jurisdiction over, 288.

Court of Exchequer has no jurisdiction over, *ib.*

Except when forfeited at the assizes, *ib.*

Jurisdiction of Court of Exchequer over, *ib.*

When forfeited at sessions, mode of estreating, *ib.*

Entered into before Parliament, and the superior Courts of law, 289.

Are estreated into the Exchequer, *ib.*

New rules of practice, as to the estreat of, 290.

Scire facias on, for the Queen, 291.

a subject, 292.

Necessary, when, *ib.*

With a condition, rule as to estreating, 295.

Practice on *scire facias* on, 298.

Of special bail, form of, 307.

Scire facias on, 370.

Form of entry of, of bail, 316.

Required to be entered into by bail in error, 320.

Of bail in error, effect of, 323.

Scire facias on, 370.

in misdemeanors, 325.

RELEASE.

Plea of, to *scire facias*, 353.

RETURN.

To the writ of *scire facias*, to repeal a patent, 256.

REVERSAL.

Of *scire facias*, 23.

REVOCATION.

Of grant of patent, 277.

RULE.

To appear to *scire facias*, on recognizance of bail, 319.

For *scire facias*, above seven years old, 14.

Of court, *scire facias* not necessary to revive, 89.

For *scire facias* against members of a joint-stock-company, secondarily liable, 147.

To defendant to answer writ of *scire facias*, to repeal a patent, 256.

SCIRE FACIAS.

Advantage of, over action of debt, 230.

When in nature of an original action, 13, 231.

SCIRE FACIAS—*continued.*

- What it is, 2, 349.
- Must be founded on a record, 2.
- Must issue out of the Court where the record is, 2, 19, 351.
- Sometimes founded partly on a record, and partly on a suggestion, 2.
- Why so called, 2.
- When it lay at Common Law, 2.
- Given in personal actions, by the Statute of Westminster II., 2.
- Why required after a year and a day, 3, 6.
- An addition to the common-law right of action of debt on the judgment, 5.
- Where a new party to the suit, 6, 99, 113, 116.
- Not necessary, when new party not beneficially interested, 100, 116.
- When not necessary, generally, 8, 9, 64, 67.
 - against shareholder, 151.
- Not necessary on a statute merchant, 9, 71, 83, 232.
 - nor on a statute staple, 9, 80, 83, 232.
 - recognizance in the nature of a statute staple, 9, 83, 232.
 - where writ of execution has issued within the year, 9, 67, 84.
 - nor on warrant of attorney to confess judgment given by an insolvent, 9, 67, 88.
 - in case of the Crown, 10, 94.
 - to revive a rule of Court, 89.
 - before issuing extent in aid, 97.
- Where a judicial writ, 11.
- A *quasi* continuation of the former suit, 11, 18.
- In the nature of a declaration, 11, 349.
- When an original action, 12.
- The reason why necessary, 65.
- When there is a change of parties, 65.
- No objection that unnecessarily issued, 87.
- When irregular, 25, 351.
- Waiver of irregularity, 26, 351.
- When a nullity, 151.
- When may be quashed, 26.
- When unnecessarily sued out, 27, 352.
- Must be brought in the county where the venue was laid, 18.
- The record must be in Court, 19.
- Must recite the judgment, 19, 182, 196, 203.
 - and pursue its terms, 20.
- Amendment, power of, 20, 349.
- Distinction between, and action on the judgment, 20.
- When joint and when several, 21.

SCIRE FACIAS—*continued.*

- When reversed, 22.
- Capias* cannot issue on, 22, 351.
- When two writs of, necessary, 188.
- On old judgment, 14, 30.
- Above seven years, 14.
- ten years, 14.
- In nature of a bill in Chancery, 350.
- May be demurred to, 350.
- Must recite the judgment on which it is founded, 350.
- Proceedings on, are within pleading rules, 351.
- Voidable, when, 25, 351.
- When two writs of, required, 351.
- Writ of error on, 352.
- Pleas to, generally, 352.
- Cannot plead, to any defence to the original action, 353.
- Practice on, generally, 354.
- Motion in arrest of judgment on, 357.
- Costs on, 357.
- Necessary before issuing execution against members of companies, under the Companies Clauses Consolidation Act, 361.
- Ad audiendum errores* on change of parties, 213, 367.
- Not necessary in case of the Crown, 214.
- By assignees to recover money in sheriff's hands, 167.
- Against bankruptcy commissioner, to enforce order of Court of Review, 168.
- Whether necessary against bankrupt joint-stock company, 172.
- By assignees of bankrupt on interlocutory judgment, 166, 167.
- On final judgment, 167.
- In cases of bankruptcy or insolvency, 365.
- On bill of exceptions to the judge who sealed it, 206, 211, 367.
- To judge's executor or administrator to acknowledge or deny his seal, 212.
- In debt on bond, 31.
- Statute 8 & 9 Will. III. c. 11, s. 8, as to debts on bonds, 31.
 - effect of, 32, 33.
 - principle of, 35.
 - confined to actions of debt, 36.
 - compulsory on cases within it, 40.
- For further breaches of bond, 37, 38, 46, 358.
- Where condition in same instrument, 42.
 - is in another instrument, 41.
- For further breach of bond in not paying an annuity, 43.
- Ditto of further instalments, 44.
- For debt of the Crown secured by bond, 233.
- In case of death of plaintiff or defendant, 175, 366.

SCIRE FACIAS—*continued.*

Against heir and terretenants, 178, 190.

By personal representative of deceased to revive judgment-debt, 186.

In case of death must be brought by or against those who represent the deceased, 189.

Form of, on judgment by personal representative, 191.

By and against administrator *de bonis non*, 198.

Against executor or administrator on judgment of assets *quando*, 200, 367.

Not necessary on death of plaintiff in ejectment, 216.

Against executors and terretenants, 217.

In ejectment, 23, 215.

Necessary at common law, 215.

To revive judgment in ejectment, 215, 368.

Omission to issue, in ejectment, not an irregularity merely, 216.

For husband to have execution of his wife's debts, 157.

By or against the wife, 159.

On marriage of *feme sole* defendant in ejectment, 217.

To have execution of forfeitures to the Crown, 233.

On inquisition to find debts, 344.

On inquests of office, pleading to, 345.

Practice on, 345.

When not necessary on, 346.

On interlocutory judgment, 27, 28, 352.

Against member of a joint-stock company, 103, 145, 359.

Leave of the Court necessary for, against members secondarily liable, 115.

May issue at once against members of a joint-stock company, at the time when issued, 115.

Bond fide attempt must be made to recover the judgment against those primarily liable, before leave will be granted to issue the writ against those secondarily liable, 115, 123, 124, 128.

Against what class of members of a joint-stock company it must first issue, 120, 128.

When leave of the Court necessary before issuing, 123.

Need not proceed against all existing members before issuing writ against those secondarily liable, 124.

Defence cannot be pleaded to, which could have been pleaded to the original action, 145.

Against member of Joint-stock Company, onus lies on the plaintiff to show that he is liable, 151.

To have execution of a forfeited recognizance, 229.

To have execution of recognizance, 282.

Proceedings on, 282.

To have execution of, or to avoid estreated recognizances, 291, 369.

SCIRE FACIAS—*continued.*

- Not necessary for the Queen, when, 291.
- When necessary for the Queen, 291.
- Form of, when issued, 291.
- For a subject to have execution of forfeited recognizance, 292.
- Necessary, when, 292.
- To have execution of a recognizance after a year from its forfeiture, 292.
- Issues out of the Petty Bag in Chancery, 294.
- On death of conusee, 294.
- On recognizance the condition of which not on the face of it broken, 295.
- On forfeited recognizance in Crown cases issues out of the Crown Office, 296.
- Practice on, to estreat recognizances, with a condition, 298.
- Pleas to, 300.
- Costs on, 301.
- On recognizance of bail, when plaintiff has become bankrupt, 167.
- On forfeited recognizance of special bail, 305, 370.
- Practice on, since 1 & 2 Vict. c. 110, 305.
- Old practice on, how far retained, 306.
- Liability of bail to costs on, 308.
- Proceedings on, against bail, 313.
- Form of, on recognizance of bail, 316.
- When may be sued out, 317.
- When returnable, 317.
- Amendment of, 318.
- Signing judgment on, 318.
- On forfeited recognizance, rule to appear to, 319.
- Setting aside judge's order for judgment on, 319.
- Must issue within ten years, 319.
- On recognizance of bail in error, 324, 370.
- Proceedings on, 324.
- Against pledges in replevin, 327.
- On bond to the Crown, 331.
- Issuing of, 335.
- Its form, 335.
- Its teste and return, 335.
- Appearance to the writ, 336.
- Entering up judgment on default of appearance, 336.
- Motion to set aside, when irregularly issued, 336.
- Pleading to, 337, 338.
- Practice on, 338, 339.
- Costs on, 339.
- In cases of outlawry, 220, 368.
- To recover debts and choses in action due to, 222.
- On reversal of outlawry by statute or pardon, 224.

SCIRE FACIAS—*continued.*

To repeal letters patent, 12, 228, 245, 368.

An original writ, 228, 247.

By the Queen, 245.

By a subject, 246.

To repeal letters patent formerly prepared by the clerk of the Petty Bag office, 247.

To repeal patent, indorsement of name of superior Court on, 249.
brought in the name of the Queen, *ib.*

Bond of indemnity for costs on, 250.

Form of writ of, to repeal patent, *ib.*

When may be issued, 251.

Who must be made defendant, *ib.*

Sealing of the writ of, 252.

To repeal patent, to whom may be directed, 254.

Where returnable, *ib.*

When returnable, *ib.*

When tested, 255.

To repeal a patent, summons to defendant on, *ib.*

Return to the writ of, 256.

Notice to defendant on, to repeal a patent, *ib.*

Judgment by default on, *ib.*

Appearance to, to repeal a patent, *ib.*

Delivery of declaration in, 257.

Form of declaration in, 258.

Practice on, *ib.*

Time to plead on, 259.

Defendant must plead or demur to all the suggestions, *ib.*

Plea of abatement to, to repeal a patent, 260.

Defendant cannot plead double to, *ib.*

Pleas to, must be delivered, 261.

Issue on, 262.

may be tried in any of the superior Courts, *ib.*

Notice of trial on, 264.

Delivery of transcript of Chancery record on, *ib.*

Power of superior Courts to try issues on, 265.

Issue on, may be tried at bar or Nisi Prius, *ib.*

Trial by proviso on, 266.

Nisi Prius record on, *ib.*

Venue on, *ib.*

Trial by special jury on, 267.

Praying a tales on, 268.

Proclamation on trial of, 269.

Bill of exceptions on, *ib.*

Verdict on, 270.

Venire de novo on, 271.

New trial on, *ib.*

SCIRE FACIAS—*continued*.

Return of transcript of record, 271

Judgment to cancel, 272.

Motion in arrest of, on, 273.

Judgment for the Crown may be pleaded in bar to future action for infringement of the patent, 274.

Restoration of letters patent into Chancery on, *ib.*

Costs on, to repeal a patent, 276.

Proceedings on, do not abate by demise of Crown, 277.

Quare restitutionem non, 64, 359.

To recover residue of debt after eviction under an *elegit*, 47, 55, 359.

Ad rehabendam terram, 58, 359.

When it lies, 58.

When not necessary, 59.

On tender of residue of debt, 60.

When debt has been satisfied by accidental profits, 60, 62.

To account, 61, 62.

SEAL.

Of the Chancery Common-law Court, 252.

Of the Inrolment Office in Chancery, 253.

SEALING.

Of the writ of *scire facias* to repeal a patent, 248.

SHERIFF.

Scire facias against, by execution creditor, 218, 368.

SIMPLE.

Contract debts due to the Crown, how recovered, 341.

SITTINGS.

In Term not one sitting in Law, 182.

SOLICITORS.

Now entitled to practise in the Petty Bag office, 248.

SPECIAL BAIL.

Putting in, 304.

STATUTE MERCHANT, 9, 71.

Nature of, 72.

STATUTE STAPLE, 9.

Nature of, 78.

SUGGESTION.

Formerly thought sufficient where there was a new party to the suit, 101, 109.

Now held applicable only to collateral facts, 102, 113, 116.

SUMMARY.

Of decisions affecting joint-stock companies, 154.

SURVIVOR.

Of joint defendants, execution may be had against, within a year without *scire facias*, 177.

SURVIVORSHIP.

Scire facias not necessary in case of, 104, 123, 176.

Doctrine of, does not apply to real estate, 178.

TALES.

Praying, on trial on *scire facias* to repeal a patent, 268.

TERM.

Sittings in, not one sitting in Law, 182.

TRANSCRIPT.

Of Chancery Record, delivery of, 264.

return of, 271.

TRIAL.

By special jury on *scire facias* to repeal a patent, 267.

VACATUR.

Of patent, entry of, on the roll, 275.

VARIANCE.

When not amendable, 20.

VENIRE.

De novo on bail in error, 271.

VENUE.

Scire facias must be brought in same county, 18, 351.

In *scire facias* by baron and feme, 162.

to repeal a patent, 266.

Of *scire facias* in recognizance of bail in error, 324.

VERDICT.

On trial of *scire facias* to repeal a patent, 270.

VOIDABLE.

Scire facias, 351.

WAIVER.

Of irregularity in *scire facias*, 26, 351.

WARRANT.

And retainer of attorney to sue out writ of *scire facias*, 349.

Of attorney to confess judgment given by an insolvent, *scire facias* not necessary on, 9, 67, 88, 173.

Of attorney to confess judgment against a public officer of a joint-stock company not conclusive, 150.

WIFE.

Continuing interest of, in her debts in case of husband's death before execution, 157.

Debts accruing to, during marriage, 157.

WINDING-UP ACT.

Of joint-stock companies, effect of, 153.

WRIT OF SCIRE FACIAS.

What it is, 349.

WRIT OF ERROR.

On *scire facias*, 28, 352.

On judgment for the Crown on *scire facias* to repeal a patent, 275.

Fiat of Attorney-General must be obtained before issuing, 275.

WRITS OF ERROR.

Rule as to, at common law, 320.

On misdemeanors, recognizance of bail on, 325.

YEAR.

How computed, 11.



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